



**Alberta Darling**  
**Wisconsin State Senator**  
Member, Joint Committee on Finance

TESTIMONY BEFORE THE SENATE COMMITTEE ON LABOR, PUBLIC SAFETY, AND  
URBAN AFFAIRS  
SENATE BILL 207  
OCTOBER 24, 2011

Thank you Chairman Wanggaard and members of Senate Committee on Labor, Public Safety, and Urban Affairs for allowing me to speak to you today about Senate Bill 207, which prohibits convicted felons from suing employers that may choose not to hire them, or fire them for poor performance.

Under the Wisconsin Fair Employment Act, it is unlawful for nearly any employer to refuse to hire or terminate an individual based on his or her conviction. Wisconsin is one of only five states (Hawaii, Illinois, New York and Pennsylvania) that have employment discrimination laws addressing conviction. This puts us at a disadvantage to potential employers, especially among neighboring states like Minnesota and Iowa.

Current law makes Wisconsin companies vulnerable to lawsuits for negligent hiring. If a Wisconsin business hires a person with a conviction record and that person commits a crime against a third party while performing their job duties, that employer could potentially be liable for negligent hiring. However, if a employer tries to protect against this liability by refusing to hire such a person, they will almost certainly face a claim under the Wisconsin Fair Employment Act.

If a company hires on a person with a conviction record, and later decides they need to fire the individual for poor performance and/or a bad attitude, they have to anticipate the person will bring a lawsuit against them alleging discrimination. This constant threat of litigation is crippling to business. Man-hours are spent on compiling their case, documenting their actions, going to court, and costs build up in attorney's hours. It is not uncommon for plaintiffs to prolong this process in the hopes of receiving a settlement, or increasing a settlement amount.

Opponents of this bill will argue this bill is about discrimination. Nothing could be further from the truth. People with conviction records will still be protected against discrimination by federal law. They just won't be a separate, protected class under the Wisconsin Fair Employment Act anymore. This bill is about making Wisconsin competitive in the employment marketplace and about improving the state's business climate. We need to make Wisconsin more attractive to employers, and this bill will help do that.

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Capitol Office:

P.O. Box 7882  
Madison, Wisconsin 53707-7882  
Phone: 608-266-5830  
Fax: 608-267-0588

Toll-free: 1-800-863-1113  
Email: [sen.darling@legis.wisconsin.gov](mailto:sen.darling@legis.wisconsin.gov)  
Web page: [www.legis.wisconsin.gov/senate/sen08/news/](http://www.legis.wisconsin.gov/senate/sen08/news/)

District Office:

N88 W16621 Appleton Avenue, Suite 200  
Menomonee Falls, Wisconsin 53051  
Phone: 262-250-9440  
Fax: 262-250-8510



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**M E M O R A N D U M**

TO:           **Members, Senate Committee on Labor, Public Safety, and Urban Affairs**  
FROM:       **Thomas M. Hruz, Esq.**  
DATE:       **October 24, 2011**  
RE:          **Senate Bill 207**

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I provide the following analysis of SB 207, as well as of the Wisconsin Fair Employment Act's (WFEA)<sup>1</sup> current provisions restricting employment decisions on the basis of an individual's criminal conviction record. I present these comments on behalf of the Wisconsin Civil Justice Council (WCJC) and also, more generally, for Wisconsin's businesses, some of which I have the privilege of representing.

The WCJC and I thank you for allowing us to present this information for your consideration.

**I. Summary.**

**A. Current Wisconsin Law Governing Employment Decisions on the Basis of Criminal Convictions.**

Since 1977, Wisconsin has made it unlawful for nearly any employer to refuse to hire or to terminate an individual based on his or her conviction for a crime, even a felony conviction for a violent crime. *See* 1977 Wis. Laws 619; Wis. Stat. §§ 111.32(3), 111.321-.322, 111.325 & 111.335 (2009-10). There is an exception to this rule if the circumstances of the crime or other offense "substantially relate" to the circumstances of the particular job. Wis. Stat. § 111.335(c)1.

The exception is notoriously nebulous and challenging in terms of its application. Initially, administrative law judges and the Labor and Industry Review Commission (LIRC), both of which are charged with the WFEA's enforcement, determined that this exception required a fact-intensive review of factors that an employer is to consider when determining whether an individual's criminal record is of a relation substantial enough to the job at issue. These factors included, but were not limited to: (1) the public profile or nature of the individual's job; (2) the principal duties of that job; (3) the time that had elapsed since conviction(s); (4) mitigating circumstances involved in the crime(s) for which the conviction arose; (5) evidence of rehabilitation; and (6) the number and seriousness of the crimes.

The Wisconsin Supreme Court rejected this approach in its 1987 ruling in *County of Milwaukee v. Labor & Industry Review Commission*, 407 N.W.2d 908 (Wis. 1987). Since that decision, the exception generally requires only a significant degree of similarity between the nature of a crime, as defined through its elements, and the nature of a job, as defined through its

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<sup>1</sup> Wisconsin Statutes, Chapter 111, Subchapter II.



duties and the context in which it is performed. The Court expressly rejected an interpretation of the substantial-relation exception which would require, in all cases, a detailed inquiry into the facts of the offense and the job. *Id.* at 916. Instead, the Court ruled that assessing the relationship between the circumstances of a criminal offense and the circumstances of a job requires only an inquiry into “the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.” *Id.*

Despite this precedential ruling, lower courts and administrative agencies still have broad discretion when applying this standard, as witnessed by the rulings in various cases over the past decades. These cases include a number of questionable rulings in favor of violent criminals over their potential employers. As a result, it is not altogether clear to businesses how the exception will be applied when they engage in decisions over the hiring or termination of any particular individual. What’s more, certain ex-convicts (and their legal counsel) are savvy enough to threaten, or actually to assert, unlawful discrimination claims in the hopes of using the mere threat of litigation as a means to achieve either the employment at issue or (more commonly) monetary, “nuisance-value” settlement of such claims.

#### B. Proposed Legislation.

Senate Bill 207 would amend the WFEA such that it would *not* be unlawful employment discrimination for an employer to refuse to hire or to terminate from employment an individual who has been convicted of a felony *and* who has not been pardoned for that felony. This would be the case *regardless of* whether the circumstances of a felony relate to the circumstances of a particular job. The bill would permit employment discrimination on the basis of pardoned felony convictions or misdemeanors, but only if the circumstances of the offense “substantially relate” to the circumstances of the job—i.e., the standard currently applicable to all offenses.

The bill also finds the governance of employment decisions on the basis of arrest or conviction records to be a matter of statewide concern. It therefore preempts cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit any activity allowed under the WFEA, as amended.

### **II. Wisconsin’s Rule Providing Employment Protection to Convicted Criminals Is Decidedly the Minority View.**

Wisconsin remains one of only a handful of states with employment discrimination laws addressing conviction records.<sup>2</sup> No other states beyond these handful have directly addressed within their statutory laws the matter of employment discrimination based on criminal conviction

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<sup>2</sup> These other states appear to include Hawaii, Kansas, Illinois, New York, and Pennsylvania, although under varying standards.



records for all employers.<sup>3</sup> Rather, courts in other states that address discrimination complaints based on the use of conviction records mostly defer to the treatment available under Title VII of the Federal Civil Rights Act of 1964 (Title VII) and either explicitly or implicitly adopt the “disparate-impact” test developed under this federal law, which is discussed immediately below.

### **III. After Passage of SB 207, Applicable Laws Would Still Protect Against Certain Forms of Employment Discrimination on the Basis of Conviction Records.**

It is important to recognize that what the WFEA currently accomplishes—by including persons with conviction records among the enumerated classes protected from employment discrimination—is the enabling of what is understood in the law as a “disparate treatment” claim for discrimination. In other words, with limited exceptions, so long as there is *any* intent to use an individual’s criminal conviction as a basis to take an adverse employment action, an unlawful violation occurs. SB 207 seeks to change this remarkable equation of criminal history with the other classes and activities the WFEA protects. Even then, the bill does so only modestly. Namely, it would eliminate nearly all disparate-treatment claims based on a decision not to hire or to fire someone because of his or her unpardoned felony conviction; pardoned felony convictions, misdemeanor convictions and other offenses retain the current protection found under the WFEA.

Moreover, the amendments to the WFEA supplied by SB 207 would *not* undermine the most-legitimate basis for questioning the use of criminal records in employment decisions—namely, a “disparate impact” on otherwise protected classes (such as racial minorities). Title VII prohibits ostensibly neutral job requirements, if those criteria disproportionately exclude a protected class and they are not job-related or necessitated by a feature of the job or business involved. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (making illegal, under federal law, those employment practices having a verifiable, negative disparate impact on those classes expressly protected by Title VII); *see also Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). In particular, federal courts across the country since the Eighth Circuit of U.S. Court of Appeals’ decision in *Green v. Missouri Pacific Railway*, 523 F.2d 1290 (8th Cir. 1975), have consistently ruled that use of conviction records as an *absolute* bar to employment is unlawful, due to the commonly disparate impact on racial minorities of such a policy. *See, e.g., U.S. v. City of Chicago*, 549 F.2d 415, 428 (7th Cir. 1977). However, these rulings do not entirely preclude the use of a criminal conviction as an employment factor, if this information is used for a readily identifiable, purposeful and defensible reason.

Given that Wisconsin also recognizes the viability of disparate-impact claims under the WFEA, *see, e.g., Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 594-95, 476 N.W.2d 707 (Ct. App. 1991), a similar system would be created under the WFEA for employers who consider unpardoned, felony convictions in their hiring decisions.

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<sup>3</sup> A number of states have different employment discrimination laws in relation to public-sector employees versus private-sector workers, with greater protections being afforded the former category of employees.



This point undermines arguments that a change such as that accomplished by SB 207 somehow tacitly allows employers to unabashedly discriminate against any and all persons with a felony record. Employers' use of conviction record information in personnel decisions will remain governed, and limited, by Title VII and the WFEA under disparate-impact analyses.<sup>4</sup> These laws, combined with the ready aid of the regulators who administer them, will still protect Wisconsin citizens from truly invidious discrimination. Again, this approach is how nearly all other states handle the issue of conviction-record discrimination in employment decisions.

#### **IV. A Hobson's Choice?: The WFEA's Ban on Convicted-Record Discrimination and Wisconsin's Law on Negligent Hiring.**

Like many other states, Wisconsin recognizes negligent hiring as a tort action. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233 (Wis. 1998). Therefore, a Wisconsin business could potentially be negligent in hiring a particular person with a conviction record if the employer knew, or should have known, that person was prone to commit a crime against a third party while performing the employee's job duties. If the employer attempts to protect against this liability by refusing to hire such a person on this basis, it will almost assuredly face a claim under the WFEA.

It has been argued that this concern over negligent hiring liability is not that great in application, even if in theory it seems entirely plausible—i.e., that prohibitions on employers considering conviction records should not increase liability for employers under negligent hiring. This may very well be true, but that may also be because courts are hesitant to strictly enforce negligent hiring torts, especially in such contexts. In all events, the mere fact that the issue of negligent hiring arises in the context of employment discrimination based on conviction records highlights the inherent, material difference between criminal records and other prohibited reasons for employment discrimination.

#### **V. The WFEA's Ban of Any Employment Discrimination on the Basis of Conviction Records Is Poor Policy.**

Employment discrimination laws exist primarily to protect populations that are prone to harmful discrimination or those that historically have been discriminated against, thereby unjustly limiting their opportunities in the labor market and impugning their dignity. Implicit in these laws is a determination that the trait or traits defining protected populations are largely, if not wholly, unrelated to an individual's ability to successfully perform a job.

The notion that criminal histories are *always* "unrelated" to an individual's suitability for employment is fundamentally wrong. An applicant's character, including his or her propensity to commit crimes, is highly relevant to businesses when making hiring decisions. This is especially true of small businesses, in which the working unit is composed of a closely knit set of

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<sup>4</sup> This point is limited inasmuch as Title VII's provisions only apply to employers engaged in interstate commerce and that have at least 15 employees, 42 U.S.C. § 2000e(b), unlike the WFEA, which governs all employers in Wisconsin with at least one employee, Wis. Stat. § 111.32(6)(a).



employees, each often with considerable responsibility to the business's welfare. Yet, the law currently protects criminals, including violent ones, over employers, most of whom attempt in good faith to hire those persons who are the best for their respective businesses but also may wish to avoid associating with certain criminals.

It is also troubling that a person's conviction record is being accorded the same protection as other bases of discrimination, such race, sex and religion. Although the intention of the law is largely based on social policy considerations of criminal rehabilitation, it remains exceedingly difficult to justify why this highly mutable trait—one terribly reflective of an individual's character—is essentially restricted for employers to consider. Meanwhile, a multitude of *other* character-relevant traits avoid (properly) legal scrutiny.

Finally, SB 207's effect is neither to explicitly nor implicitly condone irrational discrimination based on criminal records. It simply permits employers the discretion to openly weigh the importance of a conviction to the hiring or retention of an employee. To the extent that economic and business considerations cause employers to decide that an applicant is the best person for a job, despite his conviction record, that freedom will remain. Judicious employers often will still hire the most-productive workers, regardless of someone's criminal past. What *will* occur, however, is that the criminal offender will bear the onus of demonstrating that he or she should be absolved of that offense, at least in terms of genuinely manifesting an ability and willingness to perform the job at issue with due respect to the rights of others.





**Wisconsin**

**Statement Before the Senate Committee on  
Labor, Public Safety and Urban Affairs**

**By**

**Bill G. Smith  
State Director  
National Federation of Independent Business  
Wisconsin Chapter**

**Monday, October 24, 2011  
Senate Bill 207**

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Mr. Chairman, members of the Committee, I appreciate this opportunity to comment on Senate Bill 207.

The NFIB is a non-profit organization of approximately 12,000 members located throughout our state. The typical member has fewer than ten employees, has \$350,000-400,000 in annual gross sales, and the compensation of a typical small business owner member is about \$40,000 per year.

I hope you will keep that profile in mind as I testify today in favor of passage of Senate Bill 207.

Current law presents considerable financial risk to a small employer. A settlement of \$3, \$5 or \$10,000 in an employment-related action, regardless of guilt or innocence, can be devastating to a small business.

Small business owners support this legislation not because they choose to discriminate or unfairly deny employment opportunity to an applicant, but because they have an obligation and responsibility to their customers, as well as those employed in that workplace.

When there are just 3, 5 or a dozen employees, it is critical they work together and are comfortable with their fellow workers. Disharmony, distrust, fear, and uncertainty dramatically reduces sales, limits production, and threatens the economic viability of that firm.



Aside from the serious financial risk that the current fair employment law can impose on our state's small businesses, there is also personal risk, which may be true for all firms, but for smaller businesses, this risk is especially unique and potentially devastating.

A study by the NFIB Education Foundation, entitled *Business Starts and Stops*, included a profile of family involvement in a new business. I'd like to share with you a profile of that involvement.

About 20 percent of the start-up businesses had at least one family member as an active participant in that business – a spouse is the most frequent family member actively involved in the business – 32.6 percent followed by:

- 23.5% - Siblings
- 13.0% - In-Laws
- 9.2% - Child
- 9.2% - Parents of the business owner
- 4.5% - Other relatives

The conclusion is obvious – small business owners need the necessary legal tools to help them maintain a secure, harmonious workplace environment for their family members who are typically employed at a small business, and these small firms should not be placed at any unnecessary financial risk as a result of making decisions they feel are in the best interests of their employees and their family members.

As a long-term member of the Prison Industries Board, I understand the importance, and also know the challenges of finding meaningful employment for ex-inmates.

Members of the Prison Industries Board work hard developing programs that will help turn former inmates into productive citizens.

We need workers at all skill levels – I am confident passage of SB 207 will not unjustly or unnecessarily deny work opportunity to any applicant. This legislation does not prohibit employers from hiring or promoting people with criminal records.

It is a reasonable proposal, favored by 86% of our members according to recent survey studies, and I urge members of the Committee to act favorably on Senate Bill 207.

Thank you.



To: Committee on Labor, Public Safety and Urban Affairs

From: Linda Ketcham, Executive Director  
Madison-area Urban Ministry

Date: October 24, 2011

Re: Opposition to SB 207

On behalf of Madison-area Urban Ministry thank you for this opportunity to express our opposition of Senate Bill 207.

Madison-area Urban Ministry is a private faith based non-profit agency founded in 1971. We have been working with men and women returning to the community from prison since 2002. Additionally we have been working with children of incarcerated and formerly incarcerated parents since 2000. Our programs, Circles of Support, the Journey Home and Windows to Work and the Phoenix Initiative all focus on assisting individuals in rebuilding their lives after incarceration. The ability to obtain and retain employment is one of the key factors to successful reintegration to the community. These programs and many similar programs around the state are based on solid research and evidence based practices about what works in corrections.

We stand opposed to Senate Bill 207 because it is bad corrections policy. It does will not increase public safety and indeed the bill contradicts the focus and goals of the WI Department of Corrections' efforts to reduce recidivism in our state.

It seems to us that this bill is a remedy in search of a problem while creating a host of new problems for already struggling families in our communities. In testimony offered before the Assembly Committee on Labor and Workforce Development proponents of this bill could offer no evidence that these types of complaints and lawsuits are widespread.

The reality is that the introduction of WI Circuit Court Access Program (CCAP) has already led to large numbers of men and women with convictions never getting past the application process. Employers receive an



application and can immediately look the individual up on CCAP and throw the application away. Without a tracking mechanism CCAP has allowed employers to already screen out people with convictions. But what about the men and women who have employment, who have been working for years and are now suddenly at risk because of an unpardoned conviction? They have served their sentence, they have become a contributing member of the community. At what point do we stop punishing them?

At what point do we stop punishing their families? We work with children who have parents involved in the criminal justice system. Children, tens of thousands of them in Wisconsin, are the collateral damage of our criminal justice system and this bill, if passed, will mean more of those kids continue in poverty due to parental unemployment. They may be thrown back into poverty when their parent loses a job because of an unpardoned conviction. We know that living in poverty impedes academic performance for many children. We know that living in poverty becomes a cycle many children cannot escape. We know that having a strong parental role model, a parent who is working, who is supporting his or her family, sends a powerful message to a child. This bill harms children.

Since notice of this legislation got out I have received numerous phone calls from parents of young adults who have convictions, most often for non-violent drug offenses. They are worried, rightfully so, about what this bill means for their child's future. As one mom told me, her daughter committed a crime at age 17, she was charged as an adult, she was convicted. Now in her early 30's her daughter has turned her life around, she is one semester away from a Bachelor's degree in nursing but it did not come without a fight. Indeed, she had to fight for the opportunity to practice her chosen profession.

You have heard testimony from groups who support this bill. They are trade groups, they are large associations with a vested interest in overturning legislation that holds them accountable for discrimination. According to the WI State Journal, Walmart is one of the corporations supporting this bill. It is interesting to note that in 2005 a contractor in Beaver Dam hired work release inmates to assist in building the Walmart warehouse and Walmart took no position on the use of cheaper inmate labor to build one of their facilities. It is also interesting to note that the Director of Government Affairs for the Associated General Contractors of WI, Inc. serves on the Board of the WI Civil Justice Council, and yet there was no outcry by this

group in 2005 when contractors negotiated with the work release program at Fox Lake Correctional Institution to use inmate labor for the Walmart contract.

Indeed, the sole intent of this bill is to allow employers to discriminate against individuals who have a conviction record. Now supporters of this bill in the Assembly have argued that it will not prohibit an employer from hiring someone. True, but I think it is disingenuous to argue that there will not be disparities in how these decisions are made and who will most likely be able to find employment despite a conviction record. On a weekly basis we see men and women who cannot get a foot in the door for an interview despite having the qualifications listed in the employment ads. They cannot get interviews, they cannot get past the application process and when they do some are told that they cannot get. Compare that to the experiences of Steve Foti, Chuck Chvala, Scott Jensen and Brian Burke and Bonnie Ladwig, all convicted of crimes in the legislative caucus scandal. Steve Foti is a lobbyist with the WI Retail Council, indeed he was getting out on work release to lobby while serving his sentence. Brian Burke is a defense attorney and Chuck Chvala also regained his law license. All of these individuals have rebuilt their lives. Scott Jensen appealed his conviction and prison sentence because he had the financial resources to appeal his conviction. We don't begrudge the ability of these men and women to rebuild their lives, that they have had a second chance. It is actually what we hope for those who have made mistakes. But let's not pretend that the experiences of these powerful, empowered, politically connected men and women are representative of the 70,000 men and women currently in our criminal justice system.

According to a 2005 article by the WI Lawyer, from 1979 to 2005 only 604 pardons were granted, with the most being granted by Governor Thompson. At this very moment there are over 20,000 men and women on supervision or in prison in WI. In 26 years 604 pardons, 23 per year on average. The pardon process is long, it can take months if not years. In the meantime, how many jobs will someone be denied and how many people currently employed may be terminated from employment for no other reason than they have an unpardoned felony conviction?

As a faith based organization we are concerned with the overly punitive nature of this bill. Many of the world's faith traditions, including Christianity and Judaism, call on us to care for one another and to forgive. This bill is unforgiving by decreasing the likelihood that someone can

SB 207/

indeed put the prison bars behind them and rebuild their life. AB 286, given the reality of how many pardons are actually granted, this bill denies forgiveness and the opportunity for redemption. There is a line in a prayer from my faith tradition, perhaps you are familiar with it, "forgive us our trespasses as we forgive those who trespass against us." At what point do we forgive those who have made a mistake?

It is difficult enough for someone with a criminal conviction to obtain employment. SB 207 will make it more difficult. SB 207 will disproportionately affect African Americans in our state due to the racial disparities that currently exist in our criminal justice system. SB 207 will decrease public safety by denying individuals the opportunity to find employment (and consequently housing which costs money). SB 207 will harm children and families, and it will likely increase recidivism in our state. We believe that SB 207 is bad corrections policy.

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## Ramey press release: Governor signs Ramey bill to curb recidivism rate

Created: Thursday, July 14, 2011 5:05 p.m. CDT

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Text Size: [Aa](#) [Aa](#) [Aa](#) [Aa](#)

Governor Quinn signed House Bill 3360 into law Thursday. The measure, sponsored by State Rep. Randy Ramey, R-West Chicago, requires the Department of Employment Security, in cooperation with the Department of Corrections, to provide increased employment opportunities for prisoners who have fulfilled their sentences and are ready to reenter society.

"We currently have a revolving door in our State's correctional system. Finding proper employment for released convicts is the best way to keep them from turning to crime once again," said Ramey. "We have mechanisms in place to help them that aren't being used, and this simply aims to put them to use."

The legislation seeks to further require the Illinois Department of Employment Security to assist released prisoners in finding gainful employment. An audit found that the department was not following through in this endeavor, in large part due to the fact that the agency previously charged with the task, the Department of Public Welfare, was assimilated into the Department of Corrections, leaving a void.

This law would clean up the state statutes and clarify that the duties solely lie with the Department of Employment Security removing the bureaucratic barrier standing in the way of a successful program.

### Comments

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## Missouri praised for ex-offender re-entry

Special to The American | Posted: Thursday, July 14, 2011 12:01 am

The State of Recidivism: The Revolving Door of America's Prisons, a recent report by the Pew Center on the States, praises the reentry reforms that the Missouri Department of Corrections, and its probation and parole officers and staff, have been following the past several years.

Released offenders in Missouri are subject to "'e-driven supervision' (the 'e' is for evidence, which uses a new risk assessment tool to categorize parolees and help set supervision levels," the Report notes. "The payoff has been dramatic: 46 percent of offenders released in fiscal year 2004, for example, were returned to prison within two years, either for a new crime or technical violation. Since then, the rate has dropped steadily, and reached a low of 36.4 percent for offenders released in fiscal year 2009," the report concludes.

The study, conducted by Pew in collaboration with the Association of State Correctional Administrators, was based on a survey of state corrections departments and is the most comprehensive study of state recidivism rates to date.

Pew's findings have significant implications for policy makers struggling with painful budget choices. State corrections spending, driven almost entirely by prison expenditures, has quadrupled over the past two decades, making it the second fastest growing area of state budgets, trailing only Medicaid. The report finds that if states could cut their recidivism rate by 10 percent, they could save an estimated \$635 million combined in just one year.

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## Announcement for 08/31/11

### **Integrating Evidence-Based Practices in Recidivism Reduction in Kennebec County, Maine**

The Kennebec Regional Reentry Program (KeRRP) was established in 2010 with the stated goal of reducing recidivism among individuals returning to the Augusta area who are at high risk of returning to prison. It seeks to interrupt the cycle of criminal thinking and behavior by integrating case management, medication monitoring, and behavioral health treatment both before and after release.

Recognizing that treatment and support services are only effective if they are informed by the science of recidivism reduction, program planners incorporated evidence-based practices into the program's design. They applied the "Risk-Need-Responsivity" principle to determine whom to target with what type of intervention, and how to deliver those services to ensure maximum impact.

First articulated by researchers Don Andrews, James Bonta, and Robert Hoge in 1990, the Risk-Need-

motivation or mental health needs, and match services to the participants' learning style.

This feature describes how KeRRP applies the RNR Principle in how it 1) identifies participants, 2) provides services prior to a participant's release, and 3) and serves individuals after release.

### **Defining a Target Population and Identifying Program Participants**

Program planners selected KeRRP's target population based on whom research shows will experience the greatest reduction in recidivism with intensive services and supervision. KeRRP serves people who present a high risk of recidivating, have a high need for services, and who serve part of their sentence under community supervision following release. Consistent with current research, the program uses a variety of screening and assessment tools to understand the local jail population and determine who meets the program's eligibility criteria. These tools help to identify potential participants whose profiles show a high risk of recidivism and high a need for services.

### **Case Planning and Evidence-Based Pre-Entry Services**

When a participant elects to enroll in the program, the state's pretrial services agency develops an individualized case transition plan. They base these plans on the risk/needs assessments administered both prior to admission as well as those conducted in the jail. The RNR Principle helps guide the development of these plans. Pretrial services and the program participant collaboratively develop a transition plan that addresses behavioral health, education, and employment needs. Consistent with the Need Principle, the participant's most significant and immediate needs—self-identified and from the assessments—are prioritized. Particular emphasis is placed on the participants' personal goals and plans for change during this process. The Responsivity Principle guides the program's decision to train staff who work with participants to develop these case plans using cognitive-behavioral communication skills, including motivational interviewing.

Once the case plan has been developed, the participant begins KeRRP's five-week intensive institution-based treatment and skill-building program, Criminogenic Addiction and Recovery Academy (CARA). KeRRP program administrators who designed CARA describe it as a "quad-occurring disorders" treatment approach. CARA enhances co-occurring substance abuse/mental health treatment by integrating trauma-informed and risk-reduction interventions designed to reduce criminal thinking and behavior. The CARA curriculum is delivered by staff with extensive training in changing behavior. Program fidelity is closely monitored and program administrators use participant outcome data to improve the quality of program delivery.

Evidence shows that if people at low risk of recidivism come in with those at a higher risk, the likelihood of recidivism actually increases for the lower risk individual. Therefore, KeRRP isolates program participants from the larger jail population. The program also requires that participants dress in more formal attire (as a way of preparing them for job interviews, which program case managers help them set up). Furthermore, participants' daily routines are highly structured, and each participant has a set of responsibilities they are required to uphold. If these expectations are not met, a set of swift, fair and commensurate responses or sanctions are imposed. Conversely, program administrators use incentives to reward pro-social behavior—up to and including early release (for those who are eligible for it). These program elements are based on research into what type of institutional environment

KeRRP's community-based interventions are highly structured. Following release, each participant begins a six month community-based re-entry process called "REACH" (an acronym for Responsibility, Empowerment, Accountability, Change, Humanity). REACH is a three-phased program, with each phase defined by five objectives (corresponding to the unique terms in the acronym). Each objective includes a set of goals, which in turn includes corresponding expectations and activities. For example, goals and expectations include accepting responsibility for one's actions; managing responsibilities; learning skills required to be a successful member of a community; taking accountability for the terms, conditions and expectations of community supervision as well as the KeRRP program; practicing coping skills, behaviors and thinking styles learned during CARA; and volunteering time through a service organization. To complement the REACH program, many KeRRP participants also engage in restorative justice and mentoring programs coordinated by NAMI.

### **Getting it Right**

Although KeRRP integrates evidence-based practices throughout the entire program, it is important to note that there is no silver bullet for reducing recidivism, and program administrators have realized that reducing reoffending doesn't happen overnight. Rather, reducing the likelihood that participants will return to criminal activity requires the right strategies to be mobilized at the right time, in the right way, and for the right individuals. KeRRP has taken strong steps to use the best evidence to change the lives of their program participants and disrupt the costly cycle of crime and incarceration.

To learn more about KeRRP, please contact:

Bob Kingman, J.D., M.Ed., LCPC, CCS  
Director, Correctional Health and Jail Diversion Services  
Crisis and Counseling Centers  
32 Winthrop Street  
Augusta, ME 04330  
(207) 626-3448  
(207) 626-3453 [fax]

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## NEWS

### Mo. Lawmakers Want Cheaper, Safer Prison System

Alysha Love, KMOX Capitol Bureau

August 25, 2011 9:37 AM

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**JEFFERSON CITY, Mo. (KMOX)** - Missouri's governor put his stamp of approval Wednesday on the efforts of a group of legislators and criminal justice officials to find ways to reduce the revolving door effect in prisons.

Led by Rep. Chris Kelly, D-Columbia, and Sen. Jack Goodman, R-Mt. Vernon, the group has been working together since the spring to analyze the current corrections system, sentencing and public offenders. The 13

members are working to create a plan that would decrease recidivism and increase efficiency — all while saving tax dollars.

"It is vital to ensure that we not only continue to keep Missourians safe by holding offenders accountable, but also the taxpayers continue to get a good public safety return on their investment," Nixon said at a press conference Wednesday.

Currently the Department of Corrections houses more than 30,000 inmates.

"If we can engage and involve at a much younger age some of these folks who are clearly on a path to crime, it'll really make a difference," Jay Nixon said. "That's why it's this broader view of this, about what is not only going to be a short-term fix but a long-term solution, a long-term shift, in the way we deal with these issues in this

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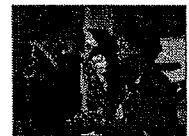
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"We must learn from other states and adopt those policies that achieve more public safety with few public resources."

The working group has support from Democrats and Republicans in both chambers of the legislature as well as the state's executive and judiciary branch, and it's seeking input from local prosecutors, sheriffs and victim advocates as well.

"I have never in my legislative time seen such a confluence of concerned folks willing to work together from a diversity of backgrounds, a diversity of life experiences, diversity of political perspectives," Goodman said. "It gives me great optimism that this working group will come out with a work product that will make the people of Missouri safer."

The corrections group plans to present its legislation to the Missouri General Assembly during the upcoming 2012 legislative session.

"It's an aggressive timeline, but these are all informed people," Nixon said. "The sense I've had so far is that this is a serious group; I understand they're doing serious work, trying to save lives, save money, make streets safer and turn lives around."

The working group's efforts follow recommendations from the chief justice of Missouri's Supreme Court that legislators find prison alternatives for first-time, non-violent offenders who represent a low risk of becoming repeat offenders.

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## **COLUMN — Recidivism: We can do better**

**By Bob Ashby**

**Community columnist**

Posted Sep 05, 2011 @ 05:04 AM

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Holland — There are currently about 2 million men and women in U.S. prisons. According to a Congressional Research Service (CRS) study in 2008, 95 percent of that population will be released back into society at one point or another. Each year more than 650,000 offenders are released and there are a little under 5 million ex-offenders under some type of community supervision. None of these numbers include persons who served their full sentence and were directly released without supervision. The CRS study noted that unsupervised releases accounted for up to another 20 percent of ex-offenders.

Of course releasing prisoners is only part of the story. The same CRS study revealed that by the end of a three-year period, over two-thirds of released prisoners had been rearrested, about half of them for new crimes and the rest because of "technical" violations of their paroles. The sad part of these statistics is that, to a point, the longer parolees are out, the higher the chance of their failure.

Failures are not isolated to the ex-offenders alone. Besides the obvious possibility of new victims, there is collateral damage as well, including, in many cases, the parolees themselves and their families. Studies have verified what should be intuitive, that any ex-offender's inability to re-integrate into society in a positive, meaningful way does harm. Studies indicate that the process of incarceration, failed re-entry and re-incarceration creates emotional and behavioral problems within offender families. The process also tends to destabilize social ties and can have repercussions on entire neighborhoods. As a 1991 study verified, in some neighborhoods children "are more likely to know someone involved in the criminal justice system than to know someone who is employed in a profession such as law or medicine."

Something is clearly wrong with the status quo and there are plenty of targets to blame, the most common ones being ex-offenders themselves. It is easy to assume that parolees are just bad people. Make no mistake, there are truly bad people who stay bad. The heinous nature of their crime should prevent them from ever being foisted upon society a second time. For some re-offenders that may be true, but only for the minority.

The rest of the story is not so simple. In many cases, newly released prisoners, whether supervised or unsupervised, face daunting challenges. Besides food, shelter, clothing and transportation expenses, there are fines, court costs and restitution expenses. Healthy relationships suffer, if they continue at all. For many, depending on their circumstances and including those close to them, the sense of failure, purposelessness and social stigma can be overwhelming.

As a society, we can do better. Every indication points to the need for comprehensive rehabilitative interventions, which include life skills training, counseling, substance abuse treatments, social connections and more. Interventions must begin at the time of incarceration and continue through the completion of parole. At the same time, justice must not be cheated. Appropriate punishment and restitution are musts.

Ultimately, offender re-entry is not successful until there is peace between perpetrator, victims and society. Without that peace, collateral destruction from crime will continue to grow. There is, therefore, one more set of processes needed — repentance, forgiveness, healing and restoration. Once these processes happen personally and genuinely for the offenders, they need to happen between perpetrator, victims and society. Only a restorative justice system and a restorative mindset in society will meet all the needs. The cycle will not be broken until eligible ex-offenders are welcomed as fully forgiven participants in society.

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## ***2008/2009 Study of Probation/Parole Revocation***

### ***EXECUTIVE SUMMARY***

**Prepared for the Wisconsin Department of Corrections**

**June 2009**

**By**

**Kit R. Van Stelle and Janae Goodrich  
University of Wisconsin Population Health Institute  
[www.pophealth.wisc.edu/UWPHI/](http://www.pophealth.wisc.edu/UWPHI/)**

A copy of the full report “2008/2009 Study of Probation and Parole Revocation” can be downloaded from <http://www.pophealth.wisc.edu/UWPHI/about/staff/vanstellek.htm>



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Department of Population Health Sciences • 5901 Research Park Blvd, Madison, WI 53791-1244  
Phone: (608) 262-5948 • Fax: (608) 263-5243 • <http://www.pophealth.wisc.edu/uwphi>

## STUDY OVERVIEW AND SCOPE

The University of Wisconsin Population Health Institute (PHI) collaborated with the Wisconsin Department of Corrections (DOC) to examine issues related to revocation of probation and parole. The study was conducted between April 1, 2008 and March 31, 2009. The study population included adult offenders under any form of community supervision (probation, parole, mandatory release, or extended supervision) who were admitted to prison without a new sentence between January 1, 2003 and December 31, 2007.

The primary questions of interest to the Department were: Why are offenders revoked and sent to prison when they have not been convicted of a new crime? What are the offender behaviors that lead to revocation? And what alternatives are being used in advance of pursuing revocation? To address the primary study questions PHI conducted (1) a thorough review of national best practices in the areas of policy, practice and use of graduated sanctions, (2) analysis of aggregate historical trends and patterns among 20,315 offenders who were admitted to prison with no new sentence as a violator of probation or parole between January 1, 2003 and December 31, 2007 (excluding sex offenders, temporary holds, and alternative to revocation admissions), (3) conduct a case-level review of 200 offenders randomly selected from the aggregate data to better understand the reasons for revocation and agent decision-making, (4) begin the process of setting up a means to address recommendations of the Commission on Reducing Racial Disparities in the Wisconsin Justice System related to revocation, and (5) provide information to DOC administration and policy-makers to assist in making any needed changes in policy, practices, resource allocation, staff training, and future budget decisions.

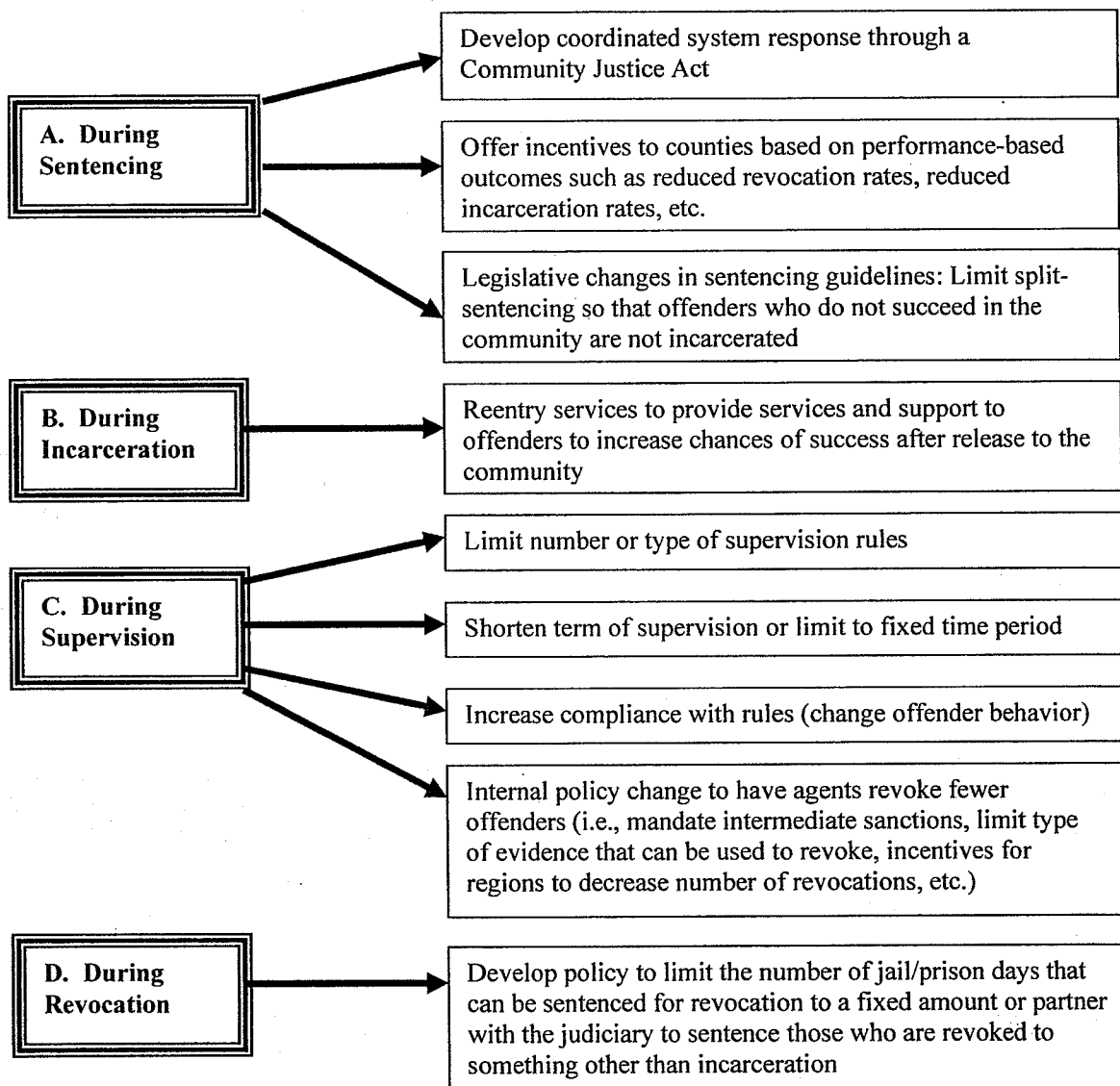
## BEST PRACTICES IN REDUCING REVOCATION

In addition to conducting a comprehensive review of the available literature on evidence-based practices (EBP), PHI conducted telephone interviews with correctional department staff of six other states (Arkansas, Georgia, Iowa, Kansas, Pennsylvania, and Texas). A semi-structured telephone interview protocol was developed that gathered information about the history of revocation in their state, efforts to reduce revocation rates, policy impacts, and practice impacts. The telephone interview data was integrated with the literature review and a summary was developed that detailed changes to policy and practice implemented by other states and research groups to reduce revocation due to technical violation (Figure 1).

The findings of the best practices review suggest that the Department should consider a variety of the following options during sentencing, incarceration, and supervision that have been implemented in other states:

- 1) Develop a coordinated system response through a Community Justice Act;
- 2) Refine use of risk assessment to focus efforts on high risk offenders and customize supervision intensity and rules based on risk level;
- 3) Develop a departmental goal of reducing revocations by a specified percent for each supervision region and/or provide assistance to regions in decreasing revocations;
- ④ 4) Consider legislative changes in sentencing guidelines to shorten the term of supervision or limit supervision to a fixed maximum time period;
- 5) Continue to develop a Departmental EBP-based reentry plan focusing on education, housing, and employment to support successful reentry; and
- 6) Impact agent decision-making and responses to offender behavior with system-level policies that encourage graduated alternatives to revocation.

**Figure 1: Best Practices Responses to Revocation in Other States**



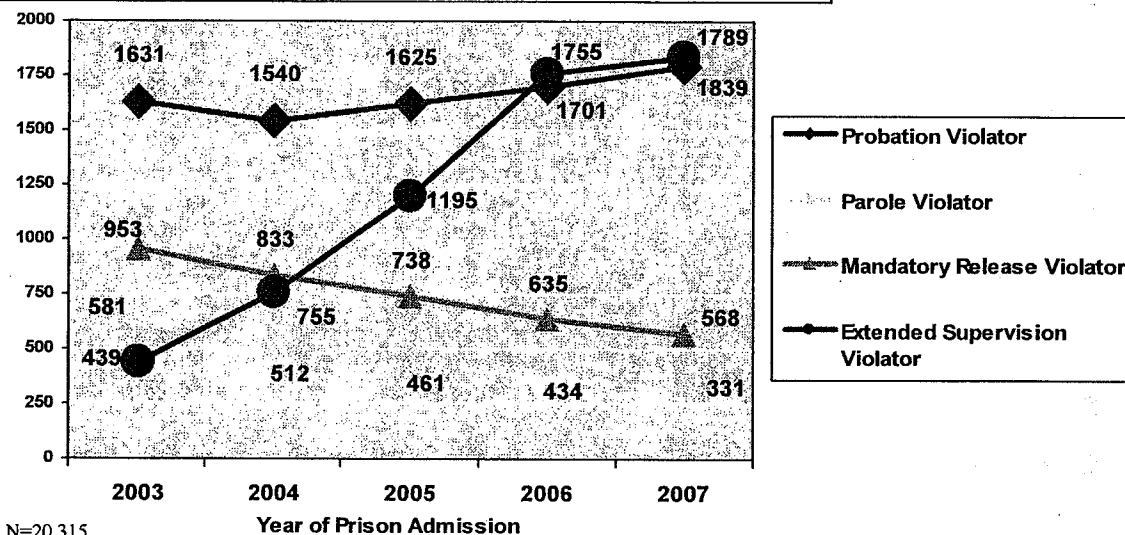
#### **AGGREGATE HISTORICAL ANALYSES OF REVOCATION DATA**

PHI analyzed the aggregate revocation data received from DOC that included all individuals admitted to prison with “no new sentence” from 1/1/2003-12/31/2007. Excluded from the dataset were sex offenders, offenders admitted to prison as temporary probation/parole admissions, and alternative to revocation admissions. Within the dataset utilized for analysis, there were 20,315 prison admissions with no new offense during the five-year period of interest.

The analyses revealed that the overall number of offenders revoked and admitted to prison with no new sentence increased each year between 2003 and 2007 in all supervision regions, with the exception of Region 3 (Milwaukee) which stayed relatively stable. Significant resources were expended in Region 3 during this timeframe (i.e., WiserChoice, Prisoner Reentry Initiative) which may have impacted this trend.

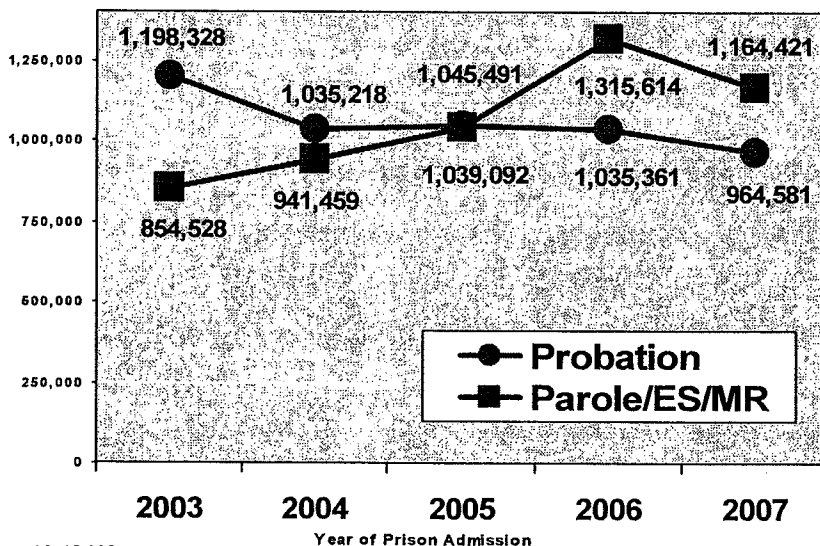
There were significant increases in the number of extended supervision (ES) violators and probation violators admitted to prison with no new sentence between 2003 and 2007 (Figure 2). In addition, 3,361 offenders were admitted to prison with no new sentence during the study timeframe. These offenders represented more than one-third (36%) of the total admissions with no new sentence, accounting for 7,281 of the 20,315 prison admissions during the timeframe.

**Figure 2: Number Admitted to Prison With No New Sentence by Violator Type by Year**



The number of probation violators increased over the years, but the amount of time spent in prison decreased. Thus, the total bed days used by probation violators actually decreased between 2003 and 2007 (Figure 3). Bed days used increased for parole/ES/MR violators, with a spike in 2006.

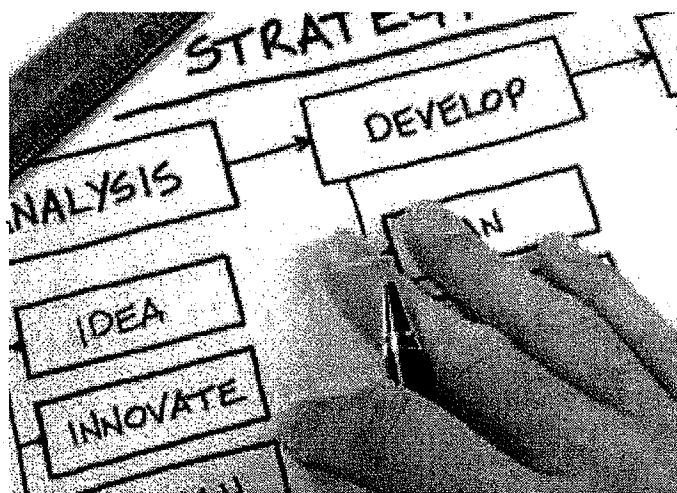
**Figure 3: Total Prison Bed Days Consumed By Offenders Admitted to Prison With No New Sentence By Probation/Parole and Year**



## Innovative Policies & Foresight at the Montana Department of Corrections

By Bob Anez, Communications Director Montana Department of Corrections

Published: 07/18/2011



The recent national recession has prompted corrections systems to look at ways to reduce their prison populations as a way to save money, relieve overcrowding or both. They have developed or expanded treatment and other diversion programs, tinkered with sentencing laws, or released large numbers voluntarily or under court orders.

The Montana Department of Corrections has avoided those dilemmas due to careful planning, innovative policies and foresight that have their roots in the past decade.

While Montana's prison population is small compared to that in many more-populous states, the average daily population of about 2,550 inmates is significant for a state

with less than 1 million residents.

In 2006, the department's projections anticipated the prison population would increase 47.7 percent between 2006 and 2011. The actual change turned out to be a 0.3 percent decrease. Two years later, the department projected prison growth of 12 percent between 2008 and 2011, but the actual increase was about half of that – 6.4 percent.

### So what happened to head off projected growth?

In 2005, the state embarked on an ambitious effort to turn the tide. A new governor, legislators and corrections officials recognized that the state could not afford the social and financial cost of constantly expanding the prison system to accommodate more and more inmates. The state had tried to build its way out of the problem in the 1990s, adding four new prisons that expanded the system by almost two-thirds. Once again, the cells were full.

Gov. Brian Schweitzer, elected in 2004, supported proposals designed to expand community corrections alternatives to incarceration. He and corrections officials reasoned that development of myriad options to address the individualized needs of offenders would do more in the long run to control the prison population than building more cells. Providing sufficient treatment for offenders' addictions and offering programs to address mental health problems would have a greater chance of getting to the roots of recidivism than mere incarceration, they concluded.

The state already had a 3-year-old program to treat those convicted of felony drunken driving that had trouble meeting the demand. Located in western Montana, the program was expanded with a second facility to serve the eastern part of a state that is more 500 miles across. The WATCH (Warm Springs Addictions Treatment and Change) program has a 92 percent success rate.

treatment efforts. After three years of operation, the programs have seen just 1 percent of graduates go to prison.

Since 2004, Montana has increased the population in six prerelease centers (called halfway houses or re-entry centers in some other states) by 41 percent, to more than 800 offenders. These programs not only provide services to offenders transitioning to communities from prison, but also offer a sentencing option for courts.

The department, with the support from the governor and legislators, also has expanded the number of probation and parole officers by 27 percent since 2004. Two-thirds of all offenders under department supervision are probationers or parolees and 80 percent of all offenders are managed outside of prison.

With the help of a federal grant, the state added eight specialized probation and parole officers in early 2010 with a goal of reducing recidivism among two high-risk populations: Native American offenders and offenders facing the dual challenges of drug addiction and mental health problems. Initial results show the revocation rate among the specialized Native American caseload declined 45 percent and the rate among those with co-occurring disorders was down 20 percent.

Between 2004 and 2010, Montana expanded its various community corrections programs by rates ranging from 15 percent to 131 percent. At the same time, the male prison population grew just 5 percent and the female prison population dropped 13 percent.

Overall, Montana's recidivism rate of 37.6 percent is lower than the national average of 40 percent found in 2010 survey by the Association of State Correctional Administrators. A 2011 report by the Pew Center for the States showed Montana's recidivism rate for new crimes is the lowest in the country and that Montana had the nation's second slowest-growing recidivism rate in the nation when comparing offenders released in 1999 to those released in 2004.

"We try to be innovative and imaginative in our approach to corrections, looking to create a system that recognizes a one-size-fits-all approach is less-effective than one that focuses resources on addressing the varied individual needs of offenders," says Corrections Director Mike Ferriter. "With the support of the governor, legislators and Montana citizens, we think we have done that and the results show its working."

Although most of the new correctional programs were started in the past decade, one major step was taken 18 years ago when the Legislature gave judges the option of sentencing offenders to the Department of Corrections for it to decide on placement in an appropriate program or facility. This "DOC commitment" provision in sentencing law was based on the theory that, in some instances, correctional professionals are in the best position to determine placement of offenders.

The provision, believed to be unique in the country, has had increasing success in helping to control the prison population. In 2001, about 52 percent of such "DOC commits" went to prison. Ten years later, less than 23 percent were placed in prison.

Since before statehood, Montana corrections officials have recognized the value of providing work-skill programs in prison. Montana Correctional Enterprises, a division of the department, carries on that philosophy in the 21st century. The success of its programs is evident in the status of offenders after leaving prison. The recidivism rate among those involved in industry programs more than a year is about 29 percent, compared with 38.4 percent for offenders not participating.

While Montana hasn't found a magic wand for stopping growth of the prison population, it has found a philosophy and programs that appear to have stemmed the tide and prevented razor wire from dotting the landscape under the state's Big Sky.

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## Comments:

([www.parentinginsideout.org](http://www.parentinginsideout.org)), that not only positively impacts rearrest rates, but also gives inmate parents the skills to help their children choose a pro-social path in life. Lower recidivism for parents and breaking the cycle of intergenerational criminality can reduce incarceration and its costs now and in the future. Combined with substance abuse treatment and mental health services, parenting education helps inmates build or rebuild the positive family and social networks that decades of research have shown are key to successful reentry.

2. **Agotten** on 07/13/2011:

Taxpayers of the state of Florida also pay a heavy financial burden for Corrections. Political pundits have successfully used a 'get tough on crime' policy for years to rack in the votes. But it comes with a price tag that Floridians can no longer afford for judicial practices that are not working. If we are wise, we will consider adopting a strategy like Montana's, a proven benchmark for any state wanting to capture the vision of healing, training and educating offenders vs stockpiling them. I believe we now have a new Governor whose ears may be open to such a plan. And who may be willing to put sparse tax dollars to a better use than building and staffing more prison holes.

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The implications of the aggregate analyses and findings included:

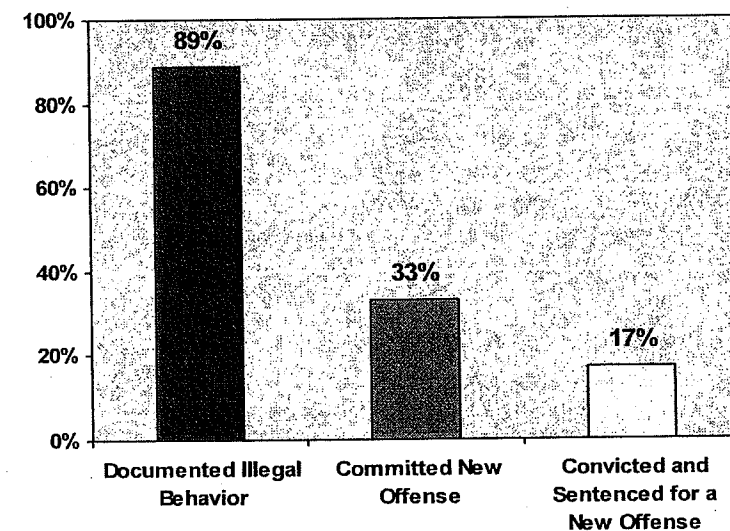
- 1) Identify approaches to address “churning” of ES violators who are repeatedly returned to prison with no new sentence;
- 2) Truth-In-Sentencing practices may have increased the length of time offenders are under supervision, increasing the likelihood of revocation; and
- 3) Uniform use of a validated criminal risk/needs assessment that accurately differentiates between offenders of varying risk levels is critical.

### IN-DEPTH CASE-LEVEL ANALYSES OF REVOCATION

To gain insight into the events preceding revocation, PHI conducted in-depth case reviews of narrative and electronic data for a random sample of revocation cases. The case-level sample consisted of 200 offenders that were randomly selected by supervision region from the aggregate dataset to proportionally represent revocation by supervision region. Data related to offender behaviors, agent responses, revocation processes, and offender characteristics were abstracted from: Pre-sentence investigations, supervision violation reports, revocation summary, revocation order, risk/needs assessment results, classification summary, termination summary, supervision rules, revocation hearing disposition, chronological narrative agent contact logs, prison timeline, and Circuit Court Automated Program (CCAP) arrest, conviction, and sentencing data.

Analyses of these data revealed that the majority of offenders (89%) had a new offense or illegal act documented in the agent chronological log while on supervision. One-third of all offenders (33%) committed a new offense that was the basis for the revocation, and one-fifth (17%) of all offenders committed a new offense for which they were later convicted and sentenced (Figure 4).

**Figure 4: Illegal Behavior/New Offense Prior to Revocation  
Based on Analysis of Case-Level Random Sample**



N=200

In the majority of cases (81%) the agent responded to offender behaviors with a combination of graduated responses, community-based alternatives to revocation (ATR), repeated attempts over a period of time to encourage offender success in the community, or filing for revocation in response to a new offense. Agents used graduated responses to offender behaviors for 48% of all of the cases included in the case-level random sample.

Agents filed for revocation an average of 15 months after supervision start for all cases. Agents filed for revocation more quickly for ES violators, filing an average of eight months after supervision start. There were no significant differences in time to revocation filing by gender, race, age, year, supervision region, prior felony conviction, prior juvenile incarceration, conviction for a new crime, type of governing offense, or length of governing offense sentence.

Examination of governing offense sentences revealed that nearly one-half (44%) of the cases reviewed received a determinate sentence for their governing offense, one-third (34%) received an imposed & stayed sentence, and about one-fifth (22%) received a withheld sentence. Overall, offenders were sentenced to an average of 40 months of prison for their governing offense and ES violators received an average of 27 months of confinement and 32 months of ES supervision time for their governing offense. There was no difference in the average months of ES sentenced by year, but the average months of ES did vary by supervision region. Approximately one-half of the cases (48%) who received ES as a component of their sentence received an ES portion that was greater than the confinement portion.

Use of evidence-based practices should continue to be emphasized to reduce revocations that result in admission to prison with no new sentence. The Department should increase the consistent use of graduated responses to offender behaviors through continued implementation of the Department's *Functional Response to Violations* grid and emphasize the use of a continuum of non-incarceration intermediate sanctions such as substance abuse or mental health treatment, employment support, and electronic monitoring.

## **RACIAL DISPARITIES ANALYSES**

An additional component of the current study was to contribute to the process of addressing recommendations of the Commission on Reducing Racial Disparities in the Wisconsin Justice System. Specifically, the study was asked to address the recommendation: *"DOC should monitor whether there is an ongoing racial disparity in revocations and whether there is any indication that such decisions are being made based upon any inappropriate considerations such as race or whether current practices are exacerbating racial disparity."*

Both the aggregate historical data and the case-level random sample data were utilized to assess racial disparities in revocation among black and white (including Hispanic) offenders who were revoked and admitted to prison with no new sentence. Cases with a race designation of Native American, Asian, or other were excluded from the analyses. The dataset excludes sex offenders, offenders admitted to prison as temporary probation/parole admissions, and alternative to revocation admissions.

## Wisconsin Lawyer

Vol. 78, No. 2, February 2005

### To Forgive, Divine: *The governor's pardoning power*

In Wisconsin, the power to pardon belongs exclusively to the governor, who can exercise it essentially in any manner the governor sees fit. For practical purposes, Wisconsin governors have been restrained in exercising their power, having themselves established procedures for applying for pardons, commutations, and reprieves, and established screening panels to evaluate such applications.

by **Donald Leo Bach**

"To Err is Human, to Forgive Divine."

- Alexander Pope,  
*An Essay on Criticism*



**I**n light of the controversies caused by some highly publicized presidential pardons, and legislative interest in reestablishing the death penalty in Wisconsin, attention has been drawn to the extent and nature of the pardoning process in Wisconsin. That process can be summed up in a single statement: the power to pardon belongs solely to one person - the governor - who can exercise it essentially in any manner the governor sees fit.

#### The Governor's Pardoning Power

The governor's pardoning power is granted in the Wisconsin Constitution. Article V, section 6 of the Wisconsin Constitution provides:

**"Pardoning Power.** Section 6. The governor shall have power to grant reprieves, commutations and pardons,<sup>1</sup> after conviction,<sup>2</sup> for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons... He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve, with his reasons for granting the same."<sup>3</sup>

In 1833 in *United States v. Wilson*, Chief Justice Marshall described the power to pardon as: "... an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."<sup>4</sup>

The pardoning power granted by the Wisconsin Constitution resides solely with the governor, and there are no constitutional standards the governor must follow for granting or denying clemency. The Wisconsin Constitution gives the governor the unfettered discretion to grant or deny (and condition) reprieves, commutations, and pardons for any reason whatsoever.

This precept is succinctly stated in 59 Am. Jur. 2d *Pardon and Parole* § 44 (2002):

"Any executive may grant a pardon for good reasons or bad, or for any reason at all, and the act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons for the pardon. The constitution clothes the executive with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary. Whatever may have been the reasons for granting a pardon, the courts cannot decline to give it effect, if it is valid upon its face, and no court has the power

to review grounds or motives for the action of the executive in granting a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be a manifest usurpation of authority, no matter how flagrant the breach of duty upon the part of the executive." [Footnotes omitted]

The Wisconsin Legislature has enacted few laws relating to the pardon application process and then only for persons currently serving sentences of one year or more. These laws include:

1) the requirement that service of notice of the pardon application be made on the trial judge, the district attorney, and the victim (or victim's family member). Publication of the notice in the county where the offense was committed also is required.<sup>5</sup>

2) requirements for the contents of the application, including proof of service and publication of the notice; certified copies of the indictment or information; a sworn statement of the facts and reasons on which the application is based; statements, if obtainable, of the judge and district attorney; records of conduct while incarcerated; and victim's statement, if submitted, on the application.<sup>6</sup>

3) authorization and procedures to enforce a conditional pardon.<sup>7</sup>

### Types of Executive Clemency

The pardoning power takes three forms:

1) **Pardon.** A pardon is an act of official forgiveness that restores all of the convicted person's rights that were lost due to conviction for an offense. Thus, a pardon restores rights that were lost with a felony<sup>8</sup> conviction, including the right to vote,<sup>9</sup> the right to perform jury duty,<sup>10</sup> the ability to possess firearms,<sup>11</sup> the right to hold public office (including the right to hold a notary public commission),<sup>12</sup> and the right to hold various licenses (such as alcohol and tobacco licenses) or be granted certain statuses.<sup>13</sup>

Some other examples of restored rights include: the right to obtain a private detective license<sup>14</sup> or a private security permit<sup>15</sup> (that is, security guard permit) and the ability to become a law enforcement, jail, or secure detention officer.<sup>16</sup> Additionally, unless a pardon is granted, the general prohibition against discriminating against convicted persons in employment does not apply if the circumstances of the offense substantially relate to the circumstances of the job or licensed activity (for example, a nonpardoned person may not be bondable when bonding is required or where installation of burglar alarms is involved, among other things).<sup>17</sup> Further, under Wisconsin's Caregiver Law,<sup>18</sup> individuals who have been convicted of certain offenses are generally barred from working in medical, childcare, and nursing home facilities (unless they are cleared through the "rehabilitation review" process outlined in the statutes).<sup>19</sup>

Theoretically a pardon can also relieve an offender from Wisconsin's enhanced penalties for repeat offenders if "such pardon [is] granted on the ground of innocence."<sup>20</sup> However, since under policy set by governors in recent times, the Pardon Advisory Board typically does not, and will not, engage in "retrying the crime," this statute is of small solace to the repeat offender. Additionally, a pardon prevents another from using the fact that a person has been convicted of a crime to attack his or her credibility as a witness.<sup>21</sup> The above list is not meant to be exhaustive.

When a person completes his or her sentence, the person automatically regains "his or her civil rights" as specified by the Department of Corrections (DOC).



**Donald Leo Bach,** U.W. 1974, was Gov. Tommy G. Thompson's first legal counsel. He also held the position of

governor's office director. He later served in several other appointed positions in the Thompson administration, including as chair of the Parole Board and as deputy secretary of revenue. Bach is a shareholder in the Madison law firm of DeWitt Ross & Stevens where he practices litigation, environmental, and administrative law. He formerly served as chair of the State Bar Bench - Bar Committee and currently heads up its Survey Subcommittee. He also is a member of the Judicial Commission, which conducts investigations for review and action by the Wisconsin Supreme Court regarding allegations of misconduct or permanent disability of a judge or court commissioner.

Wis. Stat. section 304.078 provides that, except as provided in sub. (3), every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her prison term or otherwise satisfying his or her sentence. The certificate of the DOC or other responsible supervising agency that a convicted person has done so is evidence of that fact and that the person is restored to his or her civil rights. The DOC or other agency must list in the person's certificate rights that have been restored and that have not been restored.

Subsection (3) of Wis. Stat. section 304.078 provides that if a person is disqualified from voting under section 6.03(1)(b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification. The DOC or, if the person is sentenced to a county jail or house of correction, the jailer shall inform the person in writing when his or her right to vote is restored under this subsection.<sup>22</sup>

The term "civil rights" in section 304.078 has traditionally been construed to be limited to the right to vote.<sup>23</sup> The statute was recently amended by 2003 Wis. Act 121 (effective Feb. 21, 2004) with the addition of subsections (1) and (3). The latest amendments were intended solely to address the issue of the right to vote and, specifically, to mandate that a person be informed of the restoration of the right to vote to "balance" the Act's other requirement, in Wis. Stat. section 973.176(2), that a convicted person be informed at sentencing of the loss of the right to vote. Therefore, the amendments were not intended to change or expand the scope of the term "civil rights" beyond its traditional and longstanding interpretation.

Typically, the only rights the DOC specifies as restored are the right to vote and the right to serve on a jury.<sup>24</sup> Thus, a person must receive a pardon to regain the right to hold public office<sup>25</sup> and the right to possess firearms<sup>26</sup> and to be relieved from other disabilities imposed under law. Further, while a pardon restores rights, a pardon does not expunge, vacate, or erase the conviction nor prevent a criminal record from being discovered or being disclosed.

Gov. Doyle's Application for Executive Clemency form expressly so states:

*"Pardon: This restores all of the person's rights which were lost due to the conviction. A pardon does not expunge, erase, or seal your criminal record."* (Emphasis supplied)

This is consistent with the practice and policy of recent Wisconsin governors and reflects the "modern view." As stated in 59 Am. Jur. 2d *Pardon and Parole* § 53 (2002):

"By the modern view, the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal, but rather is an executive action that mitigates or sets aside the punishment for a crime. Pardons do not erase the fact that one was once convicted of a crime; instead, pardons eliminate any further effect of having been convicted. ... A pardon does not substitute a good reputation for one that is bad, does not obliterate the fact of the commission of the crime, does not wash out the moral stain, and does not wipe the slate clean, but rather involves forgiveness, not forgetfulness.

"An older view, which had come under significant criticism, stated that a pardon reached both the punishment prescribed for the offense and the guilt of the offender, relieving the punishment and blotting out of existence the guilt of the offender to such an extent that in the eye of the law the offender is as innocent as if he or she had never committed the offense. However, these statements have since been characterized as generalizations and are not universally accepted, recognized, or approved." [Footnotes omitted]

In his 1963 article, "Executive Clemency in Wisconsin," David Adamany, a former pardon counsel, reflected the "older view," at least in the context of the then constitutional prohibition against holding office:

"Both Governor Nelson and Governor Reynolds have regarded the pardon power as restoring the right to hold public office. Each has granted pardons for that express purpose. This gubernatorial construction implies that an executive pardon goes to the conviction itself as well as to its results. This view, though a minority view in the country, seems an especially reasonable one in Wisconsin since it provides the only avenue short of constitutional amendment for the restoration of the right to hold an 'office of trust or profit' in the state government."<sup>27</sup>

Thus, at least for the limited purpose of restoring eligibility to run for public office under the then constitutional prohibition in article XIII, section 3, one opinion was that a pardon did "go to the conviction itself as well as its results." (Article XIII, section 3 was substantially amended in 1996 and, among other changes, now recognizes that a pardon does restore the right to run for office.)

However, in his 1973 article, "Executive Clemency in Wisconsin: Procedures and Policies,"<sup>28</sup> Bruce R. Bauer strongly implies to the contrary that Wisconsin governors follow the majority rule.

Since recent governors have clearly followed the majority rule, the matter is at rest for the present; this is not to say a governor could not make an exception and issue a pardon "on the grounds of innocence" and so cite the same when newly discovered evidence unequivocally shows a person was wrongfully convicted. However, one would expect that such instances would be extremely rare and that the governor would first require exhaustion of all available judicial remedies before accepting an application for a pardon based on innocence. Further, since solely the governor "sets the rules" under article IV, section 6, the issue is in any case essentially not reviewable by the courts. Finally, while it is stated that a pardon does not wash out the moral stain, obviously the grant of a pardon does involve some implied degree of approbation by the governor and lessens the stigma of the conviction.

If a convicted felon seeks to have the conviction set aside after appeal rights have run, his or her recourse is to the court, usually under one of the following statutes: Wis. Stat. section 974.06 (motion to set aside or vacate sentence on grounds specified therein); Wis. Stat. section 974.07 (motion based on DNA testing; can be made at any time after conviction); and Wis. Stat. sections 805.15 and 805.16 (motion for new trial).

In sum, a pardon forgives the ongoing penalty (the "disability") of the conviction of a crime, not the crime itself. It is truly encapsulated in the quote "forgiveness does not change the past, but it does enlarge the future."<sup>29</sup>

2) **Commutation.** The second type of executive clemency is commutation. Commutation modifies a person's sentence, that is, it shortens the sentence or makes consecutive sentences run concurrently. It only applies to persons currently serving a sentence.

3) **Reprieve.** The third type of executive clemency is a reprieve. A reprieve suspends a person's sentence for a period of time, allowing the person to complete it at a later date. Like a commutation, it only applies to persons currently serving a sentence. Since there is no death penalty in Wisconsin, reprieves are essentially moribund.

While the governor has unfettered discretion to exercise pardoning powers, Wisconsin governors have been very judicious in their exercise of that power because of potential political fallout, public safety concerns, and recognition that a lenient practice in granting pardons would result in a veritable flood of applications.<sup>30</sup> No governor wants to issue a pardon only to have that person promptly commit another crime; either the governor would be criticized as being "soft on crime" or the governor's judgment would be questioned, or both. Similarly, certain crimes are so abhorrent to the public that, absent extremely compelling circumstances, no governor would think of granting clemency to persons who have committed those crimes. Finally, time constraints, staff budgeting, and other duties mandate that the grant of clemency be the exception, not the rule.

Indeed, in the last 25 years, Wisconsin governors have granted only 604 pardons, 46 commutations, and no reprieves. (See **Figure 1**)

### The Pardon Advisory Board and Governor's Rules

To prevent the governor from being inundated with applications, to insulate the governor during the application process, and to provide a system that carefully evaluates the merits of each application, recent governors have established a screening panel or board by executive order.<sup>33</sup> Typically, the

**Figure 1**  
Pardons Issued<sup>31</sup>  
Dreyfus to Doyle

Governor	Term	Pardons	Commutations	Reprieves
Dreyfus	1979-83	112	4	0
Earl	1983-87	202	35	0
Thompson	1987-2001	238	7	0

governor's legal counsel (or other	McCallum 2001-03	24	0	0
designee) chairs the board.	Doyle 2003-	28	0	0

Along with establishing a Pardon Advisory Board, the governor can promulgate a set of rules or procedures for applying for a pardon to supplement those established by the legislature. Typical practice has been to issue rules that:

- 1) limit applications for pardons, commutations, and reprieves to persons convicted of felonies (although a waiver for a misdemeanor may be granted in extraordinary circumstances);<sup>34</sup>
- 2) limit the ability of currently incarcerated persons and those still under supervision to obtain clemency; for example, requiring them to obtain a waiver by showing extraordinary circumstances before allowing them to apply;
- 3) mandate a certain passage of time after completion of sentence before a pardon application can be made;<sup>35</sup> and
- 4) set a minimum time period for reapplying if an application for clemency is denied.<sup>36</sup>

Typically, the rules also provide for notice to, and input from, the victim, the district attorney who prosecuted the case, and the judge who entered the conviction judgment. Further, the DOC Records Center is asked to provide information concerning the person's conduct while the person was serving his or her sentence.

The Pardon Advisory Board performs many roles for the governor. First, it evaluates the merits of the application and makes a specific recommendation to the governor whether to grant or deny the application. Second, it tests the applicant's sincerity and credibility in a hearing-type proceeding in which the applicant makes a presentation and is subject to questioning, often pointed and very blunt, by board members. Third, it provides insulation for the governor in cases in which the crime is very abhorrent or socially unacceptable, the circumstances do not merit the pardon, or a governor's acquaintance or supporter asks for a pardon that is not justified.<sup>37</sup>

The process is fairly straightforward. After a complete application is filed with the governor's office, the matter is scheduled for a hearing before the Pardon Advisory Board. Typically, it takes several months for a hearing to be held because of the great number of pardon applications. Each applicant is given approximately 15 to 30 minutes to make his or her case and answer questions. After all the presentations are made, the board votes on recommendations to the governor.

The board's recommendations usually are delivered personally to the governor by the governor's legal counsel. The governor reviews the file and the board's recommendation for each case, discusses the case with the legal counsel, and then decides whether to grant clemency. If clemency is denied, the applicant is notified by letter, which usually states a reason for the denial. If clemency is granted, the governor signs a formal certificate, a copy of which is filed with the secretary of state. Current practice is to also send the original certificate to the secretary of state, who countersigns it, applies the Great Seal of the State of Wisconsin, and returns it to the governor's office for delivery to the successful applicant.

### Factors on which Pardons are Evaluated

Several factors, which incorporate basic principles of common sense, are taken into account by the Pardon Advisory Board and by the governor in deciding whether to grant executive clemency. Any person contemplating applying for clemency must pay attention to each of these crucial factors:

1) **Nature of the crime.** Certain crimes are so serious and so objectionable that it would be difficult, if not impossible, to forgive the punishment. Persons convicted of extremely violent crimes, aggravated crimes against security and persons, crimes against young children, or multiple serious crimes (especially those occurring over a period of time) usually have little chance of securing a pardon. (See **Figure 2**)

2) **Passage of time since conviction.** This very important factor not only helps establish whether

**Figure 2**  
Types of Crimes for which Pardons were

there is a risk that the person will revert to criminal conduct but also provides a sense of whether a significant enough punishment has been imposed for the criminal transgression. The more time that has passed between the conviction (and completion of sentence) and the clemency application, assuming exemplary conduct during that time, the better.	Issued (1979-2003)	
	Murder	2
	Theft	98
	Drug-related	119
	Robbery	39
	Burglary	99
	Other <sup>32</sup>	247

**3) Punishment served without problem.** Early release from probation is an asset. Fully meeting all conditions of supervision shows an acceptance of the consequences of the crime. Bad conduct in prison or under supervision shows the opposite and may indicate that the applicant did not or does not fully understand the significance of his or her actions.

**4) Spotless conduct since the crime, plus substantial indication of a productive life, that is, a complete turnabout from criminal conduct.** This is often referred to as the "you must have lived like a saint" factor. An applicant must demonstrate that he or she has turned his or her life around by becoming a productive member of society. There simply can be no substantial contact with law enforcement authorities after the criminal conviction. Today, a person's criminal, civil, and driving records are easily obtained.<sup>38</sup> Even if a crime was committed 20 years ago and the person has led a mostly exemplary life since, a recent conviction for operating a motor vehicle while intoxicated or disorderly conduct can be enough to kill a clemency application.

**5) Need.** This factor is critical. Both the Pardon Advisory Board and the governor are very reluctant to forgive the consequences of a serious criminal conviction simply because "I want to go deer hunting, but cannot possess a gun"<sup>39</sup> or "I want my record cleared." Typically, to justify the grant of forgiveness, there must be a socially beneficial activity (for example, the granting of a professional license necessary to embark on or to continue in a career, a job promotion, a need to be bonded, or the like) that the conviction impedes.<sup>40</sup>

**6) Support of the community.** A pardon applicant typically will, and should, submit letters of support from community leaders favorable to the application. A letter from a local law enforcement official, a community leader, a coworker, an employer, or a person who holds a position of respect and trust in the community who knows the applicant is very important.

This often presents a dilemma for the pardon applicant. In many cases even the applicant's best friends and coworkers may not be aware that the applicant has a felony conviction.<sup>41</sup> To secure the support of persons who could have some impact on the pardon process, an applicant has to reveal that he or she is a convicted felon and risk the chance this revelation will have a detrimental effect on future relationships. An applicant also must face having to reveal to friends and family a conviction that happened years ago. It is especially challenging for applicants to tell their children that their father or mother was convicted of a serious crime and even served time in prison. Further, the pardon process is a process open to the public and the press. Anyone can review the pardon application and the materials submitted with it. Occasionally, pardon applications receive substantial press coverage.

**7) Chance of returning to criminal conduct.** This factor is more or less an evaluation of all the other factors.

**8) Position of the district attorney.** Since the rules require that the district attorney who prosecuted the crime be notified, the district attorney has the opportunity to make comments to the Pardon Advisory Board (and therefore to the governor) on whether the pardon should be granted. Typically, a district attorney will either not respond or will respond in a neutral fashion. However, a district attorney's negative response can have a very adverse impact on the pardon process; conversely, a positive response has a positive impact.

**9) Position of the judge.** Similarly, the sentencing judge is also notified. His or her comments can have a substantial impact, with positive comments being very beneficial and negative comments being very detrimental.

**10) Input from victims and other people.** Letters or testimony from victims, a probation agent, or other members of the public, all can and do affect the pardoning decision process, with letters and personal appearances by victims having a great potential positive or negative impact.

**11) Sincerity of the applicant/attention to the pardon application.** The pardon application presents the Pardon Advisory Board with its first look at the applicant and the applicant's qualifications under the above factors. The applicant's personal appearance at the hearing before the board presents the board with an opportunity to judge the credibility and sincerity of the applicant. The applicant must take both the application and the hearing very seriously.

## Conclusion

Only the governor wields the power to pardon in Wisconsin. If, as Oscar Schindler said, "The greatest power of all is the power to forgive," then the governor of Wisconsin possesses great power indeed. How the governor exercises that power is solely up to the governor. It is a power jealously guarded by governors and their legal counsels for exactly that reason.<sup>42</sup>

## Endnotes

<sup>1</sup>For easy reference, and consistent with the Wisconsin Constitution's naming convention, the power "to grant reprieves, commutations and pardons" will be referred to under the rubric of "pardon," "pardons," or "pardoning power." This power is also called "executive clemency."

<sup>2</sup>Compare to Article II, Section 2 of the U.S. Constitution, which grants the President the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." The President's pardoning power is not restricted to exercise after conviction.

<sup>3</sup>Whether the governor of Wisconsin has the power under Wisconsin Constitution article V, section 6 to grant relief from any disability imposed under Wisconsin law for a federal (or non-Wisconsin) conviction is an open question. See *Swan v. LaFollette*, 231 Wis. 2d 633, 605 N.W.2d 640 (Ct. App. 1999). While there is logic to the argument that the Wisconsin governor should be able to relieve any disability imposed by Wisconsin law for a conviction of a crime in federal or another state's courts, comity (and perhaps common sense) dictates otherwise. Undertaking such action puts the governor on the slippery slope of evaluating the nature, context, and impact of another jurisdiction's criminal pronouncement. Further, granting relief from disabilities for non-Wisconsin crimes would *de facto* invade the right of the President and other governors (or other state pardoning powers) to exercise their respective pardoning capacities. Finally, granting relief from disabilities imposed for convictions of crimes of other jurisdictions potentially creates a situation in which the Wisconsin governor grants clemency but the originating government (state or federal) denies the same. The rule should be that the power to pardon follows the power to prosecute and convict; that is, pardoning power should be limited to the jurisdiction in which the conviction arose.

<sup>4</sup>32 U.S. (7 Pet.) 150, 160 (1833). Perhaps in a slight exercise of hyperbole, Wisconsin Supreme Court Justice Christian Doerfler went much further: "The power expressed in a pardon is the most sacred and godlike exercised by man in his capacity of dispensing justice on earth." *State ex rel. Rodd v. Verage*, 177 Wis. 295, 351, 187 N.W. 830 (1922) (Doerfler, J., dissenting).

<sup>5</sup>Wis. Stat. § 304.09(3).

<sup>6</sup>Wis. Stat. § 304.10. The governor is required by statute to "make a reasonable attempt to notify the victim of a pardon application, as provided under s. 304.09 (2) and (3)." Wis. Stat. § 950.04(1v)(ym). Addresses of victims and their family members are not obtainable under Wisconsin's Public Records Law. If the victim's statement is made public, the address must be deleted. Wis. Stat. § 304.10(3).

<sup>7</sup>Wis. Stat. §§ 304.11, .12.

<sup>8</sup>The current definition of a felony is a crime punishable by incarceration in a state prison. Wis. Stat. § 939.60. See also Wis. Stat. § 973.02.

<sup>9</sup>See Wis. Const. art. III, § 2(4)(a); Wis. Stat. § 6.03(1)(b). A court must inform the convicted person upon sentencing or placement on probation of his or her loss of the right to vote. Wis. Stat. § 973.176. The right to vote is restored when the prison term or probation is completed. See Wis. Stat. § 304.078.

<sup>10</sup>Wis. Stat. § 756.02.

11Wis. Stat. § 941.29; 18 U.S.C. § 922(g).

12Wis. Const. art. XIII, § 3(2), (3).

13See Wis. Stat. §§ 125.04(5)(b) (alcohol) and 139.34(1) (tobacco).

14Wis. Stat. § 440.26(2)(c).

15Wis. Stat. § 440.26(5m).

16Wis. Stat. § 165.85; Wis. Admin. Code § LES 2.01(1)(c).

17See Wis. Stat. § 111.335(1)(c).

18Wis. Stat. §§ 48.685, 50.065.

19See Wis. Stat. §§ 48.685, 50.065; Wis. Admin. Code § HFS 12.

20Wis. Stat. § 939.62(2).

21See Wis. Stat. § 906.09 (and numerous similar acts in other state and federal courts).

22Admittedly Wis. Stat. section 304.078, originally passed as Wis. Stat. section 57.078 in 1947 (without anyone appearing, reporting, or voting against it), and amended as recently as 2003 Wis. Act 121, does invade to some extent the exclusive power of the governor to issue clemency. Indeed, at the time of its initial passage, E.E. Brossard, the revisor of statutes, published an article opining that the governor's pardoning power is not exclusive and that the legislature shares power to act in the area. E.E. Brossard, *Restoration of Civil Rights*, 1946 Wis. L. Rev. 281. However, this view is contrary to the holding of the Wisconsin Supreme Court in *In re Webb*, 89 Wis. 354, 62 N.W. 177 (1895), which, citing the language of Wisconsin Constitution article V, section 6, states that the power to grant reprieves, commutations, and pardons is solely vested in the governor. Further, the framers of the Wisconsin Constitution did contemplate the role of the legislature in terms of pardons, specifically limiting that role in article V, section 6 to passing regulations relating to the manner of applying for pardons and nothing else.

23See, e.g., 61 Wis. Op. Att'y Gen. 260 (1972); 63 Wis. Op. Att'y Gen. 74 (1974); *Roehl v. United States*, 977 F.2d 375 (7th Cir. 1992).

24The current DOC certificate also indicates that the ability to possess firearms and the right to hold office are not restored unless a pardon is obtained from the governor (and, in the case of firearms, if the pardon does not restrict or prohibit possession of firearms).

25A person serving in office who has been convicted of a felony loses his or her right to the office. Interestingly, even an immediate pardon does not restore the incumbent to the office; only a reversal of the judgment and conviction will do so. Wis. Stat. § 17.03(5). A pardon would allow the person to run for the office again.

26Wis. Stat. section 941.29 makes it a felony for a convicted felon to possess firearms. Possession of pepper spray by a felon is prohibited by Wis. Stat. section 941.26(4)(l). Whenever a court imposes a sentence or places a defendant on probation for a felony conviction, the court must inform the defendant about Wis. Stat. section 941.29. See Wis. Stat. § 973.176(1) (formerly Wis. Stat. § 973.033). 18 U.S.C. § 922(g) makes it a federal crime for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" (as that phrase is defined in 18 U.S.C. § 921(a)(20)) to "ship or transport ... or possess ... any firearm or ammunition." 18 U.S.C. § 921(a)(20) provides that "[a]ny conviction ... for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon ... or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

2736 Wis. B. Bull. 54, 60 (Oct. 1963).

281973 Wis. L. Rev. 1154.

29Attributed to Paul Boese. Since a pardon does not expunge or delete the crime, if asked, a convicted person must still answer that he or she was convicted of a crime. This question

(sometimes limited to felonies) routinely appears on employment applications, security questionnaires, license applications, and other forms. The person must still answer in the affirmative, but then may add: "Pardoned by Wisconsin governor on (date)."

30The Wisconsin Office of Justice Assistance reports there were 167,613 adult arrests for "index offenses" (murder, rape, robbery, assault, theft, and so on) in Wisconsin in 2003. Wisconsin Office of Justice Assistance, Preliminary Crime and Arrests In Wisconsin (May 2004).

Theoretically, even if only a small fraction result in a criminal conviction, each conviction could ultimately result in a pardon application. The Department of Corrections reports that 21,646 persons were incarcerated in Wisconsin prisons in 2003.

31The information in Figure 1 is from the Wisconsin Secretary of State and reports filed with the state senate for 1979-2004 pursuant to the Wisconsin Constitution, article V, section 6. There are some inconsistencies in the numbers (and perhaps even in the description of the crime) filed with the Secretary of State compared to the annual reports. Accordingly, some editorial judgment was necessarily applied to compile the charts from the two sources.

32This category covers a wide variety of crimes, including battery, bribery, arson, welfare fraud, filing false nomination papers, soliciting prostitution, reckless endangerment, mayhem, tax crimes, bigamy, manslaughter, gambling-related crimes, and so on.

33Gov. Dreyfus originally created the Pardon Advisory Board on March 6, 1980, through Executive Order 39; all governors since have continued its existence. State of Wisconsin, Blue Book 326 (2003-04). Prior governors relied on a pardon counsel who also performed the same function. The current Pardon Advisory Board consists of seven members appointed by Gov. Doyle, including a representative from the DOC and a representative from the Department of Justice.

34See Wis. Const. article XIII, § 3 (person is ineligible to hold public office if convicted of a "misdemeanor involving a violation of public trust"). It is an example of when a waiver to consider a misdemeanor might be granted.

35Gov. Doyle's current policy is five years; a waiver can be requested.

36Gov. Doyle's current policy is 18 months.

37The governor can simply point to the board's recommendation as justification for denial in such cases.

38For example, the Wisconsin Circuit Court Consolidated Court Automation Program (CCAP), while not totally complete, allows easy and quick access to criminal, traffic, and civil filings. The Web site is <http://wcca.wicourts.gov>.

39Formerly a potential avenue existed to restore the ability to possess a gun without the need to obtain a pardon. That avenue is still reflected in both state and federal law but has been nullified by the U.S. Congress.

Wis. Stat. section 941.29 (prohibiting a felon from possessing a firearm) refers to this alternative:

(5) This section does not apply to any person specified in sub. (1) who: . . .

(b) Has obtained relief from disability under 18 U.S.C. § 925(c).

18 U.S.C. § 925(c) provides a procedure by which a felon can ask the federal government to grant relief from the disability with respect to firearms. However, as attorney William Coleman, Office of Legal Counsel for the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) confirmed, Congress has since 1986 specifically prohibited the expenditure of funds to grant this relief, with the latest prohibition contained in Pub. L. No. 108-199.

Wis. Stat. section 941.29(5) also provides that the prohibition against possessing firearms does not apply to any person who:

(a) Has received a pardon with respect to the crime or felony specified under sub. (1) and has

been expressly authorized to possess a firearm under 18 U.S.C. app. 1203 ...

This provision references a portion of the U.S. Code that no longer exists; in 1986 it was repealed by Pub. L. No. 99-308, and replaced by 18 U.S.C. § 921 *et seq.*

40There have been some exceptions to this rule but they are rare; indeed, a lack of "need" is often cited as the reason a pardon was denied.

41Sometimes this even applies to the employers, especially those who do not use pre-employment questionnaires or perform pre-employment background criminal checks.

42Thanks to Rick Hendricks, DeWitt Ross & Stevens' librarian and superb researcher (and also a noted paranormal investigator) for his research and compiling of data at the Wisconsin Senate and Secretary of State's Office; Mary T. Cuppy for manuscript preparation; and the following persons who reviewed this article: Raymond P. Taffora, Arvid Sather, Chad Taylor, Ladd Wiley, and Juan Colas, all former legal counsels to Wisconsin governors; Stan Davis and Amy Kasper, legal counsels to Gov. Doyle; Kevin Potter, legal counsel to the Wisconsin DOC; Ron Slansky, attorney, Wisconsin Legislative Council; Michael G. Dsida, attorney, Wisconsin Legislative Bureau; attorney Bruce Rosen; assistant attorney general Marguerite Moeller; Prof. Keith Findley, codirector, Wisconsin Innocence Project, Frank J. Remington Center, U.W. Law School; and Meredith J. Ross, clinical professor of law and director, Frank J. Remington Center, U.W. Law School.

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### Pardon Advisory Board

**Aligned To:** Executive Office

**Senate Confirmation:** No

**Term Length:** serve at the pleasure of the Governor

**Web Site:** None

**Current Vacancies:** None

**Number of Open Seats:** 0

**May 2010 Expirations:** None

**Upcoming July 2010 Expirations:** None

**Details:** The board reviews applications for executive clemency and makes recommendations to the governor on each request. As part of its review procedure, it holds quarterly public hearings, at the discretion of the chair, at which applicants and persons supporting or opposing the applications may be heard. After a hearing is concluded, the board meets to arrive at a recommendation on the application. The chairperson submits written recommendations for each application, along with any dissenting opinions, to the governor.

The board consists of 7 members appointed by the governor including one DOC representative, one DOJ representative, a public defender, a district attorney, and two public members. The governor's legal counsel or deputy legal counsel is a voting member and chairs the board. Four members constitute a quorum for executive action by the board.

**Additional Info:** None

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The department may not grant jail credit where it is not provided for by statute. 71 Atty. Gen. 102.

**NOTE: The preceding annotations concern s. 57.072, 1975 stats., [now s. 304.072] which was repealed and recreated by ch. 353, laws of 1977 and again by Act 528, laws of 1983.**

Sub. (3) applies to all parole violations that occur before the offender's date of discharge from his or her entire sentence. DOC had jurisdiction to revoke a 2nd period of parole for a violation that the defendant committed during his first, and later revoked, period of parole when the violation was not discovered until the 2nd parole period. Department of Corrections v. Schwarz, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703, 03-2001

A term of supervision under sub. (3) includes the nonconfinement and confinement time arising from the same sentencing decision. With regard to identifying a term of supervision, probation, incarceration, and extended supervision are each a component of the sentence. A person who initially serves a term of probation that is ultimately revoked, and following revocation serves a bifurcated prison term, can be revoked from that prison term's extended supervision component on the basis of a rules violation that occurred during the initial term of probation. McElvaney v. Schwarz, 2008 WI App 102, 313 Wis. 2d 125, 756 N.W.2d 441, 07-0415.

### **304.074 Reimbursement fee for persons on probation, parole, and extended supervision.**

(2) The department shall charge a fee to probationers, parolees, and persons on extended supervision to partially reimburse the department for the costs of providing supervision and services. The department shall set varying rates for probationers, parolees, or persons on extended supervision based on ability to pay and with the goal of receiving at least \$1 per day, if appropriate, from each probationer, parolee, and person on extended supervision. The department shall not charge a fee while the probationer, parolee, or person on extended supervision is exempt under sub. (3). The department shall collect moneys for the fees charged under this subsection and credit those moneys to the appropriation account under s. 20.410 (1) (gf).

(3) The department may decide not to charge a fee under sub. (2) to any probationer, parolee or person on extended supervision while he or she meets any of the following conditions:

- (a) Is unemployed.
- (b) Is pursuing a full-time course of instruction approved by the department.
- (c) Is undergoing treatment approved by the department and is unable to work.
- (d) Has a statement from a physician certifying to the department that the probationer, parolee or person on extended supervision should be excused from working for medical reasons.

#### **(4m)**

(a) If a probationer, parolee or person on extended supervision who owes unpaid fees to the department under sub. (2) is discharged from probation or from his or her sentence before the department collects the unpaid fees, the department shall, at the time of discharge, issue a

notice to the probationer, parolee or person on extended supervision that states that he or she owes unpaid fees under sub. (2) and that he or she is responsible for the payment of the unpaid fees. The notice under this paragraph shall be issued with the certificate of discharge required under s. 304.078 or 973.09 (5).

(b) The department may request the attorney general to bring a civil action to recover unpaid fees owed to the department under sub. (2) by a person who has been discharged from probation or from his or her sentence and who, at the time of discharge, owed the department unpaid fees under sub. (2). Before requesting the attorney general to bring a civil action under this paragraph, the department shall deduct any fees owed to the department that were inaccurately assessed against the person.

(5) The department shall promulgate rules setting rates under sub. (2) and providing the procedure and timing for collecting fees charged under sub. (2).

History: 1995 a. 27; 1997 a. 27, 283; 2001 a. 109; 2003 a. 33.

**304.075 Loan fund for probationers, parolees and persons on extended supervision.** The department shall create a revolving fund out of any moneys in its hands belonging to probationers, parolees or persons on extended supervision who absconded, or whose whereabouts are unknown. The fund shall be used to defray the expenses of clothing, transportation, maintenance and other necessities for probationers, parolees and persons on extended supervision who are without means to secure those necessities. All payments made from the fund shall be repaid by probationers, parolees or persons on extended supervision for whose benefit they are made whenever possible; and any moneys belonging to them so paid into the revolving fund shall be repaid to them in accordance with law, in case a claim therefor is filed with the department upon showing the legal right of the claimant to such money.

History: 1977 c. 29; 1989 a. 31 s. 1705; Stats. 1989 s. 304.075; 1997 a. 283.

### **304.078 Restoration of civil rights of convicted persons.**

(1) In this section:

(a) "Imprisonment" includes parole and extended supervision.

(b) "Jailer" has the meaning given in s. 302.372 (1) (b).

(2) Except as provided in sub. (3), every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or her sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his or her sentence or otherwise satisfied the judgment against him or her is evidence of that fact and that the person is restored to his or her civil rights. The department or other agency shall list in the person's certificate rights which have been restored and which have not been restored. Persons who served out their terms of imprisonment or otherwise satisfied their sentences prior to August 14, 1947, are likewise restored to their civil rights from and after September 25, 1959.

(3) If a person is disqualified from voting under s. 6.03 (1) (b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification. The department or, if the person is sentenced to a county jail or house

of correction, the jailer shall inform the person in writing at the time his or her right to vote is restored under this subsection.

**History:** 1987 a. 226; 1989 a. 31 s. 1706; Stats. 1989 s. 304.078; 2003 a. 121.

Restoration of civil rights is not a "pardon" for the purposes of liquor and cigarette license statutes. 60 Atty. Gen. 452.

A person convicted of a crime whose sentence has been satisfied may vote. 61 Atty. Gen. 260.

A convicted felon whose civil rights have been restored pursuant to 57.078 [now 304.078] is barred from the office of notary public unless he or she has been pardoned. 63 Atty. Gen. 74.

The operation of this section on a prior conviction is irrelevant to a conviction for which a prior conviction is a predicate. *Roehl v. U.S.* 977 F.2d 375 (1992).

**304.08 Applications for pardon; regulations.** All applications for pardon of any convict serving sentence of one year or more, except for pardons to be granted within 10 days next before the time when the convict would be otherwise entitled to discharge pursuant to law, shall be made and conducted in the manner hereinafter prescribed, and according to such additional regulations as may from time to time be prescribed by the governor.

**History:** 1989 a. 31 s. 1707; Stats. 1989 s. 304.08.

Executive clemency in Wisconsin. Bauer, 1973 WLR 1154.

### **304.09 Notice of pardon application.**

(1) In this section:

(a) "Member of the family" means spouse, domestic partner under ch. 770, child, sibling, parent or legal guardian.

(b) "Victim" means a person against whom a crime has been committed.

(2) The notice of the pardon application shall state the name of the convict, the crime of which he or she was convicted, the date and term of sentence and the date if known, when the application is to be heard by the governor. The notice shall be served on the following persons, if they can be found:

(a) The judge who participated in the trial of the convict.

(b) The district attorney who participated in the trial of the convict.

(c) The victim or, if the victim is dead, an adult member of the victim's family.

(3) The notice shall inform the persons under sub. (2) of the manner in which they may provide written statements or participate in any applicable hearing. The applicant shall serve notice on the persons under sub. (2) (a) and (b) at least 3 weeks before the hearing of the application. The governor shall make a reasonable attempt to serve notice on the person under sub. (2) (c) at least 3 weeks before the hearing of the application. The notice shall be published at least once each week for 2 successive weeks before the hearing in a newspaper of general circulation in the county where the offense was committed. If there is no such newspaper, the notice shall be posted in a conspicuous place on the door of the courthouse of the county for 3 weeks before the hearing and published once each week for 2 consecutive weeks before the hearing in a newspaper published in an adjoining county. Publication as required in this subsection shall be completed by a date designated by the governor. The date shall be a reasonable time prior to the hearing date.

**History:** 1983 a. 364; 1989 a. 31 s. 1708; Stats. 1989 s. 304.09; 1997 a. 181; 2009 a. 28.

### **304.10 Pardon application papers; victim's statement.**

**(1)** An application for pardon shall be accompanied by the following papers:

- (a)** Notice of application and acknowledgments or affidavits showing due service and affidavits showing due publication and posting whenever required;
- (b)** A certified copy of the court record entries, the indictment or information, and any additional papers on file in the court, if obtainable, as the governor requires;
- (c)** A full sworn statement by the applicant of all facts and reasons upon which the application is based;
- (d)** Written statements by the judge and the district attorney who tried the case, if obtainable, indicating their views regarding the application and stating any circumstances within their knowledge in aggravation or extenuation of the applicant's guilt;
- (e)** A certificate of the keeper of the prison where the applicant has been confined showing whether the applicant has conducted himself or herself in a peaceful and obedient manner.

**(2)** When a victim or member of the victim's family receives notice under s. 304.09 (3), he or she may provide the governor with written statements indicating his or her views regarding the application and stating any circumstances within his or her knowledge in aggravation or extenuation of the applicant's guilt. Upon receipt of any such statement, the governor shall place the statement with the other pardon application papers.

**(3)** Any statement or paper containing a reference to the address of a victim or a member of the victim's family which is contained in a statement or other paper accompanying a pardon application is not subject to s. 19.35 and shall be closed to the public. The governor, using the procedure under s. 19.36 (6), shall delete any reference to the address in any statement or paper made public.

**History:** 1983 a. 364; 1989 a. 31 s. 1709; Stats. 1989 s. 304.10; 1991 a. 269, 316; 1995 a. 224.

### **304.11 Conditional pardon; enforcement.**

**(1)** In case a pardon is granted upon conditions the governor may issue a warrant to carry the conditions into effect.

**(2)** If it appears to the governor during the term of the sentence that the convicted person violated or failed to comply with any such condition, the governor may issue a warrant to any sheriff commanding the sheriff to arrest the convicted person and bring the convicted person before the governor.

**(3)** If upon inquiry it further appears to the governor that the convicted person has violated or failed to comply with any of those conditions, the governor may issue his or her warrant remanding the person to the institution from which discharged, and the person shall be confined and treated as though no pardon had been granted, except that the person loses any applicable good time which he or she had earned. If the person is returned to prison, the person is subject to the same

limitations as a revoked parolee under s. 302.11 (7). The department shall determine the period of incarceration under s. 302.11 (7) (am). If the governor determines the person has not violated or failed to comply with the conditions, the person shall be discharged subject to the conditional pardon.

**History:** 1983 a. 528; 1989 a. 31 s. 1710; Stats. 1989 s. 304.11; 1991 a. 316; 2001 a. 109.

**304.115 Emergency removal.** When an emergency exists which in the opinion of the secretary makes it advisable, the secretary may permit the temporary removal of a convicted person for such period and upon such conditions as the secretary determines. The secretary may delegate this authority to the deputy and the wardens and superintendents of the state prisons.

**History:** 1989 a. 31 s. 1711; Stats. 1989 s. 304.115.

Cross-reference: See also s. DOC 325.02, Wis. adm. code.

**304.12 Execution and record of warrants.** When a convicted person is pardoned or the person's sentence is commuted, or the person is remanded to prison for the violation of any of the conditions of that person's pardon, the officer to whom the warrant is issued after executing it shall make return thereon to the governor forthwith and shall file with the clerk of the court in which the offender was convicted a certified copy of the warrant and return, and the clerk shall enter and file the same with the records of the case.

**History:** 1989 a. 31 s. 1712; Stats. 1989 s. 304.12; 1991 a. 316.

**304.13 Uniform act for out-of-state parolee supervision; state compacts.**

**(1m)** The governor of this state is authorized and directed to enter into a compact on behalf of this state with any state of the United States legally joining therein in the form substantially as follows:

A COMPACT.

Entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting states solemnly agree:

**(a)** That it shall be competent for the duly constituted judicial and administrative authorities of a sending state to permit any person convicted of an offense within the sending state and placed on probation or released on extended supervision or parole to reside in any receiving state while on probation, extended supervision or parole, if:

1. Such person is in fact a resident of or has family residing within the receiving state and can obtain employment there; or
2. Though not a resident of the receiving state and not having family residing there, the receiving state consents to such person being sent there.
3. Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

4. A resident of the receiving state, within the meaning of this subsection, is one who has been an actual inhabitant of such state continuously for more than one year prior to coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which that person has been convicted.

(b) That each receiving state will assume the duties of visitation of and supervision over probationers, persons on extended supervision or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers, persons on extended supervision and parolees.

(c) That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation, extended supervision or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation, extended supervision or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer, person on extended supervision or parolee there should be pending against that person within the receiving state any criminal charge, or that person should be suspected of having committed within such state a criminal offense, that person shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(d) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all such states parties to this compact, without interference.

(e) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(f) That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(g) That this compact shall continue in force and remain binding upon such ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees, persons on extended supervision or probationers residing therein at the time of withdrawal or until finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw the compact to the other states party thereto.

(h) In this subsection:

1. "Receiving state" means a party to this compact other than a sending state.
2. "Sending state" means a party to this compact permitting its probationers, persons on extended supervision and parolees to reside in a receiving state.

(i) This subsection may be cited as the "Uniform Act for Out-of-State Parolee Supervision".

(2m) Subsection (1m) does not apply to this state's supervision of a person who is on probation, parole, or extended supervision from another state or another state's supervision of a person who is on probation, parole, or extended supervision from this state if all of the following have occurred:

(a) The compact authorized by s. 304.16 is in effect.

(b) Both this state and the other state are parties to the compact under s. 304.16.

(c) The other state has renounced the compact entered into with this state under sub. (1m).

**History:** 1979 c. 89; 1983 a. 189; 1989 a. 31 s. 1713; Stats. 1989 s. 304.13; 1991 a. 316; 1997 a. 283; 2001 a. 96.

**Cross-reference:** See Appendix for a list of states which have ratified this compact.

The statutory distinction between parolees out of state under 57.13 [now s. 304.13] and absconding parolees, which denies extradition to the former but not the latter, is a constitutionally valid classification under *Omernik* test. State ex rel. *Niederer v. Cady*, 72 Wis. 2d 311, 240 N.W.2d 626 (1976).

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2009-10 Wis. Stats. database updated and current through 2011 Wis. Act 44 and August 31, 2011. Statutory changes effective on or prior to 9-1-11 are printed as if currently in effect. Statutory changes effective after 9-1-11 are designated by NOTES. See Are the Statutes on this Website Official?



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## Creating a Workforce Development Culture To Reduce Reincarceration ★★★★★

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In the mid-1990s, offender reentry gained visibility as an important public policy issue. At that time, organizations such as the U.S. Department of Education (ED), the National Institute of Corrections (NIC), and the National Institute of Justice began exploring offender workforce development strategies as an avenue for promoting the successful reintegration of offenders into communities. These strategies stem from the idea that offender employment builds communities, increases the economic self-sufficiency of families, strengthens fragile families, and provides structure and support for those seeking to remain crime free.

In 2003, ED's Life Skills for State and Local Prisoners Program awarded a 3-year, \$1 million research/ demonstration grant to support Vermont's Workforce Development Program. Correctional administrators in Vermont aimed to reduce recidivism by 25 percent for offenders with poor work histories and moderate to high risk of reoffending by using a strengths-based approach to teach fundamental life skills throughout education, work, and living units.

This strengths-based program approach is built on participants' understanding and use of the "Habits of Mind," which are 16 aspects of behavioral intelligence, or life skills, that foster effective problem solving. In addition to reducing recidivism by 25 percent and reinforcing participants' acquisition of the Habits of Mind, the Workforce Development Program targeted a 90percent employment rate within 1 month of release and sought to make changes in the organizational culture at each of three program sites.

Read the rest of NIC's Transition and Offender Workforce Development Bulletin on [NIC's website](#).

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Posted Mon, Nov 9 2009 1:24 PM by Scott

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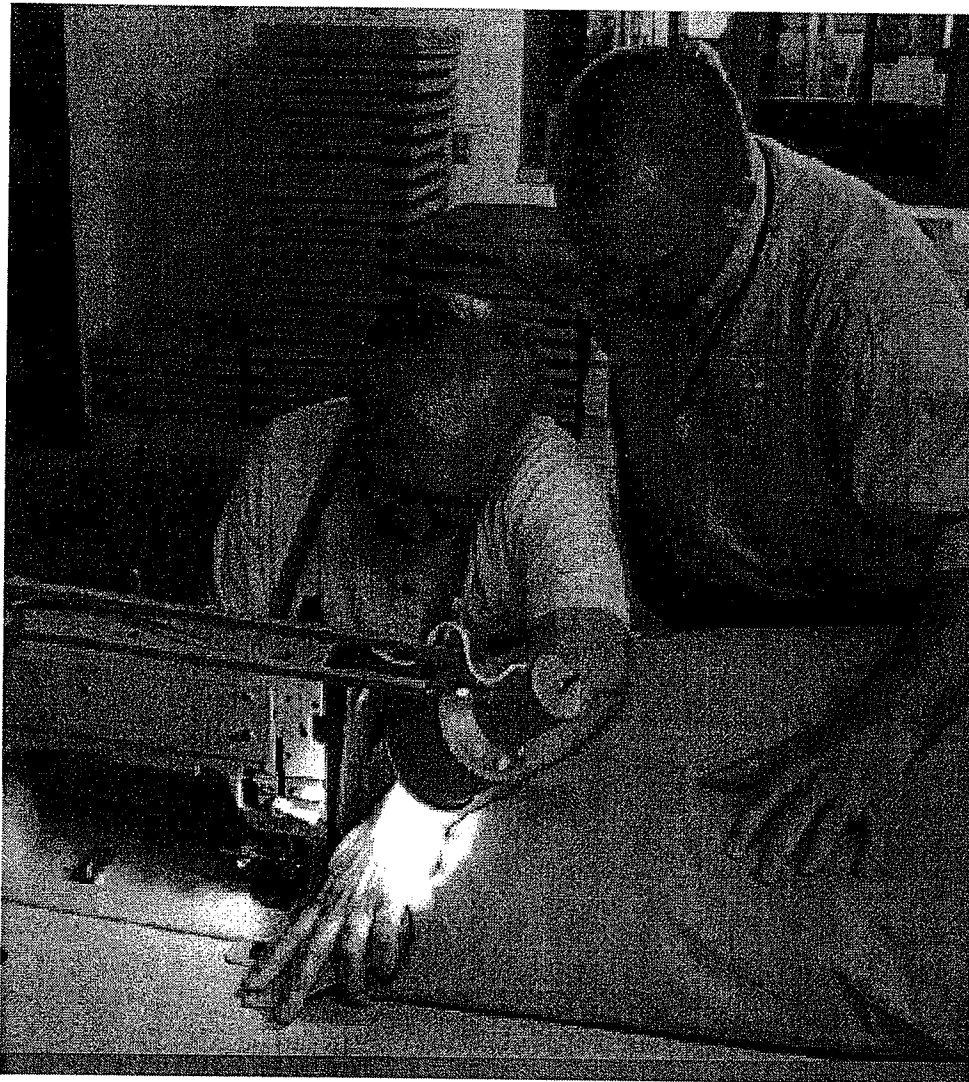
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## Creating a Workforce Development Culture To Reduce Reincarceration



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## Message From the Director

The National Institute of Corrections and the U.S. Department of Education's Office of Vocational and Adult Education have compiled information on Vermont's Workforce Development Program, a research-based correctional strategy that teaches social and work-related skills to offenders as a means to reduce recidivism. This innovative, strengths-based program, which extends throughout the correctional facilities' education, work, and living unit settings, achieved 20-percent and 37-percent reductions in recidivism for male and female program participants, respectively, during the evaluation period. In addition, within the correctional institutions the program helped foster a single organizational culture of shared purpose, values, and language, which carried across professional disciplines and between staff and participants.

This program stands as an example of how one state has chosen to address offenders who have the greatest needs—those with the highest risk of reoffending and those who have the worst work histories. The Vermont Department of Corrections' (DOCs) Workforce Development Program, the Community High School of Vermont, and DOC staff should be commended for understanding the need to focus on offender workforce development, which clearly plays a central role in the successful reentry of offenders to our communities.

**Morris L. Thigpen**  
Director  
National Institute of Corrections  
U.S. Department of Justice

**Cover Photo:** Correctional Foreman Milton Woodard assists an offender in the upholstery shop of Vermont's Northern State Correctional Facility.

**Credits:** Melissa C. Houston is the author of this bulletin. Photos are courtesy of Dana Lesperance.

This document was prepared under Cooperative Agreement Number 06K86GJN0 from the National Institute of Corrections, and U.S. Department of Justice and Interagency Agreement Number ED-06-AR-0159, from the U.S. Department of Education. Points of view or opinions in this document are those of the author and do not necessarily represent the official position of the U.S. Department of Justice or the U.S. Department of Education.

NIC Accession Number 023065

This strengths-based program approach is built on participants' understanding and use of the "Habits of Mind," which are 16 aspects of behavioral intelligence, or life skills, that foster effective problem solving. In addition to reducing recidivism by 25 percent and reinforcing participants' acquisition of the Habits of Mind, the Workforce Development Program targeted a 90-percent employment rate within 1 month of release and sought to make changes in the organizational culture at each of three program sites.

*Participation in Vermont's Workforce Development Program led to a significant reduction in reincarceration, especially for female inmates. In addition, program participants gained valuable life skills while incarcerated and were more likely to be employed within 1 month of release than were inmates in the comparison sample.*

The Workforce Development Program works within the "triad of influence," which is the combination of participants' housing, work, and school environments (see exhibit 1).

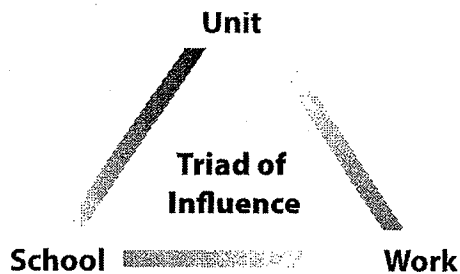
Participants attend special classes in school (Habits of Mind) and then practice what they have learned in those classes in their housing units and correctional industries workplaces. This means that participants can practice the cognitive strategies they learn in class throughout the day, not just during their time in school.

"Frankly, we do know what doesn't work," says John Gorczyk, program administrator. "Based on high recidivism rates, punishment and traditional institutional practices are not effective. This program is built on strengths and positive reinforcement. It's ironic because we've all known for years of the importance of using positive reinforcement over negative reinforcement, and when I actually saw the impact and how simple the process was, it was absolutely beautiful" (Huff 2007).

## Creating a Unique Culture

Certain universal elements define cultures, which develop when two or more people relate to each other. These elements include having a shared purpose, values, language, and systems for education and governance. A prison culture is often marked by characteristics

## Exhibit 1. The Triad of Influence



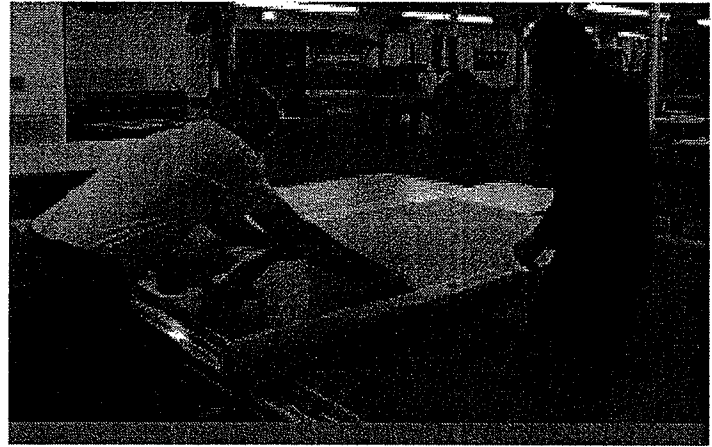
not typically found outside of corrections. Within the inmate population the culture is covert, and governance is often exercised through the threat of violence (Lucenti and Gorczyk 2005).

Even within a single correctional facility, different cultures exist. An offender will leave the education building with its set of behavioral expectations and enter a housing unit that has a completely different set of expected behaviors. The tensions among these different cultures also impact staff; conflicts between security officers and program staff in correctional facilities are a classic problem. Correctional officers claim that programs get in their way and compromise security, whereas program staff complain that officers do not hesitate to pull inmates out of class and interrupt instruction with counts, searches, and lockdowns (Finn 1997).

*[Prison is] the worst place in the world to have any sort of healthy thinking. They tell you when you eat, they tell you when you can see people, they tell you everything. They control your life. [But the program] emphasizes what you are powerful over (Huff 2007).*

—Participant  
Vermont Workforce Development Program

In an ambitious move, Vermont set out to intentionally develop one overriding culture in its correctional facilities through the Workforce Development Program. Correctional officers, teachers, and shop supervisors work in unison to actively foster and support collegial, collaborative, respectful relationships among staff, and between staff and offenders, so that everyone receives the support and supervision they need to work and live in a facility in life-improving ways (Lucenti and Gorczyk 2005).



A furniture shop offender mentor (left) assists a new offender in the mill room at Vermont's Northern State Correctional Facility.

Three professional groups with three distinct missions as well as sets of professional principles and practices were represented in the program. The education professionals were the faculty of the Community High School of Vermont (CHSVT), which is a fully accredited, independent high school administratively housed in the Vermont Department of Corrections (DOC). Because CHSVT's mission is "to provide an accredited, coordinated, and personalized education that assists students in their academic, social, and vocational successes" (Community High School of Vermont 2009), there was considerable alignment with the mission of the Workforce Development Program.

This was not the case with the two other professional groups representing the workplace and the living units. Vermont Offender Work Programs (VOWP), an independent, fully self-supporting manufacturing business, traditionally defined its mission in a manner that emphasized profitability and therefore employed only long-term, well-behaved offenders with the best work histories. To become a full partner in the workforce development strategy, VOWP had to shift its focus to the offender (or worker) as the primary product and employ short-term "problem offenders" who had minimal or no work histories. The living units presented a challenge to the success of the Workforce Development Program. Transforming the traditional institutional culture to one in which authority establishes positive behavioral expectations through the frequent use of positive reinforcement remained difficult throughout the grant period.



Correctional Foreman Bruce Page supervises two offenders making road signs at Vermont's Southeast State Correctional Facility.

## The Program's Core: A Workforce Development Culture

Vermont created its unified culture by choosing to operate the Workforce Development Program from a strengths-based perspective, characterized in part by consistent interactions across disciplines among staff and program participants, and by the generous use of structured and specific positive reinforcement.

The Workforce Development Program's evaluator, John Holt, explains, "It's not a 'gotcha' program. You focus on the positives and what you can do to increase those positives. The data is proving that it works."

The design of the program is strongly rooted in the What Works<sup>1</sup> literature. According to Gorkczyk, the issue is, "How do you do positive reinforcement if you haven't identified explicitly what it is that you want to positively

reinforce? If you just keep saying 'nice job,' and you're not explicit about what the person did that was good, it starts to lose its meaning. The Habits of Mind gave us specific cognitive behaviors that we can positively reinforce."

## Habits of Mind

The Habits of Mind curriculum is based on a series of four books written by educators Arthur Costa and Bena Kallick (2000) that describe an approach to teaching behaviors commonly expected in classrooms and other learning environments. The authors suggest that these desirable behaviors require a discipline of mind that with practice becomes a habitual way of working toward thoughtful, intelligent action, especially in uncertain and challenging situations. Costa and Kallick believe the Habits of Mind should be embedded in all curricula. The State of Vermont thought the Habits of Mind were important enough to contract with education professionals to develop a curriculum based on the books. After a field test and rewrite, the program administrators are pleased with the result.

Vermont's Habits of Mind course (Community High School of Vermont 2009) aims to:

- Support successful community reintegration.
- Improve employability.
- Improve job retention.
- Enhance, by offender choice, a reconnection to society.
- Build a sense of empowerment through the application of new skills.
- Improve collaboration both in the facility and in the community.

The 24-hour course explores 16 Habits of Mind, which support thoughtful and intelligent action by teaching specific soft skills that can help people take action when there is no easily identifiable solution to a problem.

*It's a pretty simple theory. The better somebody thinks, the more chance they'll make a better decision. It's not really much more complicated than that.*

—Stuart Gladding, Superintendent  
Northern State Correctional Facility  
Newport, VT

<sup>1</sup>For more information about What Works, visit the clearinghouse's Web page, <http://ies.ed.gov/ncee/wwc>.

*[Participants who learn the 16 Habits of Mind] tend to pick 5 or so that really resonate and they start living them. The telltale sign is that you'll hear them use the phrase, "my Habits of Mind." It's no longer the Habits of Mind; it's my Habits of Mind.*

*Speaking from a security officer's perspective, the program gives us a common language to use with offenders to address both positive and negative behavior. You can use the Habits of Mind to focus the discussion so it is meaningful and something productive comes out of it.*

—Dana Lesperance  
Vocational Education & Workforce  
Development Chief  
Community High School of Vermont

The Habits of Mind curriculum consists of the following topics and activities:

- Introduction to the Habits of Mind and Habits Portfolio.
- Thinking about thinking.
- Remaining open to continuous learning.
- Thinking flexibly.
- Persisting.
- Finding humor.
- Striving for accuracy.
- Listening with understanding and empathy.
- Gathering data through all the senses.
- Thinking and communicating with clarity and precision.
- Thinking interdependently.
- Creating, imagining, and innovating.
- Responding with wonderment and awe.
- Applying past knowledge to new situations.
- Questioning and posing problems.
- Managing impulsivity.
- Taking responsible risks.
- Putting it all together.
- Class project.

Many of the lessons include optional teaching activities to accommodate a variety of learning styles, ages, genders, abilities, and reading grade levels.

The Habits of Mind course gives participants the opportunity to experience immediate and direct benefits

by supplementing its academic component with a lab that allows participants to apply what they learn. For example, the first lab assignment is an assessment that asks participants to identify their top 25 strengths. At the end of the lab, participants plan for their futures by setting goals and developing transition plans.

## Workplace Application

Participants learn about the Habits of Mind in the classroom and in the lab, and they are encouraged to apply their skills in the living units and in the workplace. Production foremen who oversee prison worksites and the correctional officers who staff the living units also receive significant training and reinforcement in the Habits of Mind. During regularly scheduled workplace application groups, shop foremen ask program participants to reflect on the past week.

In a surprisingly relaxed and comfortable environment for a prison, participants give examples of how they or someone else used one of the Habits of Mind on the job. "I used the Habit of Mind of persisting by not giving up when I couldn't get the measurements right on the chair I was making," said one participant. Another participant observed, "I applied past knowledge to a new situation when I was trying to figure out how to get this order out on time."

In one instance, an industry site had been experiencing quality and production problems before the program's implementation. As the program progressed, a complete turnaround in production and quality occurred. Program administrators believe the emphasis on positive reinforcement, coupled with the use of the Habits of Mind, provided an avenue for total quality management and continuous improvement in the work setting.

In addition, the ability to practice thinking about how they use their Habits of Mind follows participants after release:

*During my first meeting with my probation officer, I assured her that I did not have to work. I have good support from my husband, and he makes enough to feed and house both of us. Under my secure exterior was fear in applying for jobs and being rejected. I did not want to explain where I had been and what I had been doing for the past two and a half years. I soon realized that my personality would not allow me to remain idle. I could*

*easily fall into the pitfalls of boredom, which would be very counterproductive to my recovery from addiction. The first Habit of Mind that I used was taking a responsible risk. I began to apply for jobs despite my fear of rejection. Other Habits of Mind that came into play were applying past knowledge to new situations (knowing myself and also knowing how to apply for jobs), thinking about thinking (noticing that I was making decisions out of fear), and thinking flexibly (being open to different types of work that might fit my situation).*

—Graduate  
Vermont Workforce Development Program

## Evidence of Effectiveness

*I'm just trying to fix my life. I've stayed out for 6 months now, which is huge. [I was sober, with only one slip.] I went back and I used, but I was up front with my probation officer about it. [We discussed how to prevent it from happening again. As I see it, the slip was balanced by the positive things I am doing.] Keeping a job, seeing my kid on a regular basis, keeping my own apartment, paying my bills on time—all of that together isn't to be left at the side.*

—Graduate  
Vermont Workforce Development Program

The Vermont Workforce Development Program proved to be effective in helping participants acquire the Habits of Mind, fostering a positive organizational culture, increasing employment rates, and reducing reincarceration rates. [Data analysis and narrative in this section are drawn from Holt (2007)].

**Habits of Mind.** Ninety-three percent of the male participants showed an increase in the acquisition of the Habits of Mind, whereas only 73 percent of the comparison group showed such an increase; for female inmates, the numbers were 96 percent and 63 percent, respectively. A relatively high number of comparison group members also showed increased acquisition of the Habits of Mind because many of these inmates were exposed to the Habits of Mind through association with participants in the Workforce Development Program group.

**Culture.** Self-reports from correctional professionals engaged in the Workforce Development Program indicated that the program had the desired effect of

promoting a positive organizational culture; however, the more formal aspects of culture (such as basic personnel practices, operations, and the allocation of resources) did not change as anticipated.

The changes that occurred did so with some difficulty. DOC staff and some of the industries staff struggled with the more interactive role that was required of them; however, they reported a significant increase in their job satisfaction. When asked how much their jobs have improved based on participation in the program, staff provided the following responses:

- Fifty percent reported greater job satisfaction.
- Forty-six percent reported being more effective at their jobs.
- Forty-two percent reported having a more positive attitude toward their jobs.

With respect to communication, staff gave the following responses:

- Seventy-one percent reported a greater ability to communicate with inmates.
- Thirty-three percent reported a greater ability to communicate with other staff.
- Thirty-three percent reported a greater ability to communicate with administration officials.

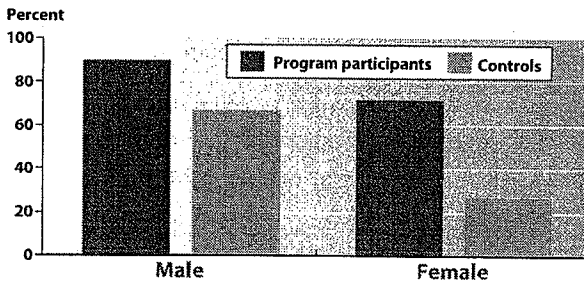
Based on outcome data and other indicators, Gorczyk believes that Vermont has achieved success in creating a workforce development culture in its correctional institutions:

We actually had industries staff and education faculty participating fully with the DOC staff on security/custody and classification decisions. Management's decision to reallocate resources to support the training of additional staff also supports this conclusion. Most importantly, the Department of Corrections administration is slowly becoming aware of the fact that the Workforce Development Program is actually not a program at all. It's a different way of doing business that is slowly finding its way into other parts of the DOC operation.

**Employment.** Ninety-one percent of the men in the experimental group obtained employment within 30 days of release, versus 64 percent of the control group (see exhibit 2). Using 6 months in the labor force as the measure of employment retention, the analysis found that 95 percent of the men who obtained employment

retained it, versus 64 percent for the control group. Sixty-eight percent of the women in the experimental group obtained employment within 30 days of release, versus 30 percent of the control group; job retention for the female participants was 92 percent, versus 75 percent for the control group.

**Exhibit 2. Employment Following Release**



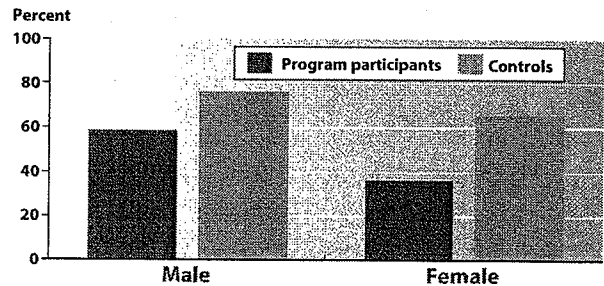
**Reincarceration.** During the grant period (March 2004 through September 2007), the program served 355 participants—191 women and 164 men who participated in 1 or more program services. Of those, 123 women and 46 men participated in all program services; this group was used to evaluate the effects of participation on reincarceration rates.

Within both genders, the comparison groups and experimental groups were high-risk offenders as measured by the Level of Service Inventory-Revised (LSI-R), with an average score of 26 for both groups.<sup>2</sup> For the 46 men who completed the program there was a 20-percent reduction in reincarceration after 6 months of release; 59 percent of the male participants were reincarcerated as compared with 74 percent of the comparison sample. For the 123 women who completed the program there was a 37-percent reduction in reincarceration after 6 months of release; 38 percent of the female participants were reincarcerated as compared with 63 percent of the comparison sample.

John Holt notes, “For the females, the results are far superior to those found in previous studies. A 37-percent reduction in recidivism is simply remarkable.” (See exhibit 3 for data on male and female experimental groups versus control groups.)

<sup>2</sup>The LSI-R is an assessment and screening tool for adult offenders (16 and older) that identifies which factors (e.g., a criminal history, alcohol/drug problems) in the offenders’ backgrounds and current situations put them at greatest risk of reoffense.

**Exhibit 3. Reincarceration**



Program administrator John Gorczyk agrees that the program achieved remarkable results with the female population:

Program staff has speculated that we may have found a fortuitous blending of the principles of evidence-based practice with those of gender responsiveness.

The program was specifically designed to be responsive to the principles of evidence-based practices. And as the program unfolded, we began to realize that strengths-based supportive supervision, coupled with the strong relational aspects of the program as expressed in the work experience and more particularly the workplace application groups, was very reflective of some of the emerging principles and practices associated with gender-responsive treatment of female offenders.

## Replicating the Program

Resources are available for jurisdictions that wish to replicate Vermont’s Workforce Development Program. The CHSVT curriculum, which is based on the Habits of Mind and the strengths-based supervision manual, can be downloaded from [www.chsvt.org/wdp.html](http://www.chsvt.org/wdp.html).

According to Gorczyk, the following guidelines are key to the successful replication of Vermont’s program, which administrators believe is within the grasp of any jurisdiction:

- Hire the best people available to administer the program at each facility.
- Encourage local control as quickly as possible.
- Provide consistent and ongoing support.
- Include an objective review of progress and effectiveness to ensure program integrity.

In replicating the program, Gorczyk recommends that each site have its own project manager. He encourages administrators to give those sites the autonomy to implement the program in a way that meets their individual needs and at the same time allows them to maintain fidelity to the program model. "I define fidelity here as adhering to the principles and practices identified by the What Works literature," he explains. "Folks at the local level need to have a sense of empowerment and ownership. There is a lot to be said for thinking flexibly and interdependently."

According to Gorczyk, Vermont's Workforce Development Program should not be limited to a particular type of institution. "No matter where you are, or how long you are there, the elements of culture are going to become operational, either at a covert or overt level, implicit or explicit," he says. "You might as well decide to define the positive cultural elements and expectation up front rather than allowing them with some passivity to develop on their own."

## Future of the Program

When the initial grant period ended in September 2007, the State of Vermont had to make a decision. The program could end, or each institution could take responsibility to keep it going. At one institution, supervisory and line staff stepped up to the plate by developing a local manual that carried the program forward after the grant period ended.

Stuart Gladding, Superintendent of Northern State Correctional Facility in Newport, VT, observes:

It's a great program in that not only do people learn a cognitive skill, but they get an opportunity for interactive practice. That's what makes it effective. And it allowed us to develop a fairly decent internal communication system between service providers, our work foremen, and security staff where information got shared on a bunch of different levels. And that helps in terms of dealing with inmate behavior. Inmates learn about what their weaknesses are and make conscious choices to do something to intervene.

To date, the Workforce Development Program is being sustained at all three initial grant sites, and two additional facilities are integrating the principles and practices into their regular operations. All new

uniform staff receive 4 hours of training in the principles of strengths-based supervision during basic training, and a proposal to extend the training to probation and parole staff is under consideration.

"This was an opportunity to do something that I had been asking other people to do for the last 20 years," Gorczyk says. "Corrections is the most valuable job you can have because you're dealing with both individual liberty interests and public safety. The Workforce Development Program is a way of doing corrections that is reflective of what we know to be what works. We've used good methodology, documented it, evaluated it, and demonstrated that it can be done."

## Program Costs

The Vermont Workforce Development Program was established through a \$1 million federal research and demonstration grant from the U.S. Department of Education, Office of Vocational and Adult Education; the State of Vermont contributed an additional \$60,000. Total expenditures from March 2004 through September 2007 were \$1,082,500. The annual breakdown of expenditures is as follows: year 1, \$188,600; year 2, \$350,500; year 3, \$325,700; and year 4, \$217,700. Exhibit 4 shows how these funds were spent during the grant period.

Funding from ED's Office of Vocational and Adult Education provided the Vermont Department of Corrections the opportunity to plan, develop, manage, and evaluate the program until the grant period ended in September 2007. Vermont's Workforce Development Program has since been able to sustain and expand the program through an annual award of \$100,000 from the Vermont State Legislature. The Vermont Department of Corrections has also established the position of Offender Workforce & Employment Chief to supervise the maintenance of this program in the initial sites and its expansion to other correctional facilities whose mission includes workforce development.

**Exhibit 4. Expenditures for Vermont Workforce Development Program: 2004–07**

Budget Item	Amount (\$)	Percent
Salary and benefits (four positions)	681,975	63.0
Curriculum development	241,397	22.3
Staff training	75,775	7.0
Incidental operating costs	83,353	7.7

## Related Resources

Vermont's Workforce Development Program is only one example of NIC's comprehensive commitment to improving employment programs for offenders. NIC's Transition and Offender Workforce Development (T/OWD) Division is the primary source of training tailored specifically for those who provide employment services for people with criminal records. NIC has developed products, programs, and services that meet the diverse needs of offender employment service providers. These resources are available at no cost by contacting the NIC Information Center (800-877-1461; asknicic@nicic.gov). In addition, many resources may be viewed, downloaded, and/or ordered from the NIC website; go to [www.nicic.gov](http://www.nicic.gov), click on "Library," and enter the title or NIC Accession Number of the resource you wish to access. E-learning training can be accessed at <http://nic.learn.com>.

### **Publications**

***Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*** (2003: NIC Accession Number 018017). This report indicates that gender-responsive practice can improve outcomes for female offenders by considering their histories, behaviors, and life circumstances. It concludes by offering guiding principles and strategies for improving the system's response to female offenders. The intended audience ranges from decisionmakers at the legislative, agency, and system levels to those who manage or serve offenders on a daily basis.

***Administrative Guide: Offender Workforce Development Specialist Partnership Training Program*** (2007: NIC Accession Number 022173). This publication provides an overview of NIC's train-the-trainer program for offender employment service providers. This training is offered by invitation only to 12-person teams from state and/or local jurisdictions for the purpose of developing the local capacity to provide offender workforce development training that meets all training requirements for trainee certification as a Global Career Development Facilitator.

***Cognitive-Behavioral Treatment: A Review and Discussion for Corrections Professionals*** (2007: NIC Accession Number 021657). This publication is intended to inform corrections and probation/parole

professionals about the availability and benefits of cognitive-behavioral treatment services geared to the specific risks and needs of offender populations.

***Motivating Offenders to Change: A Guide for Probation and Parole*** (2007: NIC Accession Number 022253).

In this guide, the authors lay out the foundations of motivational interviewing and give examples of how it can be implemented. Information is presented in a common-sense style that is easy to understand. The guide serves as a valuable prerequisite and aid to training in the use of this effective technique for facilitating positive offender change.

***Topics in Community Corrections, Annual Issue 2007: Promising Strategies in Transition from Prison*** (2007: NIC Accession Number 022777). This issue of *Topics in Community Corrections* is an outcome of knowledge sharing about the Transition from Prison to the Community (TPC) model. Several of the articles give a direct, hands-on account of the issues and challenges confronting agencies as they seek to make a significant difference in the ability of ex-offenders to stay out of the criminal justice system.

***TPC Reentry Handbook: Implementing the NIC Transition from Prison to the Community Model*** (2008: NIC Accession Number 022669). This handbook is a resource for a broad range of stakeholders involved in improving transition and reentry practices. The handbook presents the TPC model and summarizes the experiences and accomplishments of the eight states that have helped develop, improve, and bring the model to life. The handbook also presents the TPC implementation strategy that developed from the eight participating states.

***Career Resource Centers: An Emerging Strategy for Improving Offender Employment Outcomes*** (forthcoming: NIC Accession Number 023066). This is the second in a series of T/OWD bulletins. It will feature descriptions of a jail, prerelease center, and prison facilities that have established career resource centers to bridge the employment services provided by corrections with the One-Stop career system in surrounding communities. Additional resources are provided on the publication's companion DVD.



An offender adjusts his printing press while printing for the Vermont Department of Motor Vehicles.

### **CD/DVD-ROMs**

**Career Resource Centers** (2005: NIC Accession Number 020931). This software package contains resources that can be used as a foundation for the development of career resource centers in prisons, jails, or community corrections offices. Resources include career information videos, the O\*Net Interest Inventory, *Occupational Outlook Handbook*, *Career Guide to Industries*, and a self-paced and/or group-facilitated curriculum for training volunteers and/or offenders to help individuals with criminal records transition back into the labor market.

**OES: Building Bridges** (2006: NIC Accession Number 021698). This curriculum, endorsed by the National Career Development Association, is a multi-DVD/CD set that presents an entry-level training program for offender employment specialists. The set includes more than 5 hours of video incorporated into a 3-day curriculum.

**Simulated Online/Kiosk Job Application** (2008: NIC Accession Number 022996). This CD-based simulation training program is designed to help offenders prepare for computerized job applicant screening systems. It provides basic information about computerized employment applications, a printable worksheet that can be used to prepare the offenders for using these systems, and a full-length interactive application with context-sensitive help.

### **Satellite/Internet Broadcasts**

**Building Futures: Offender Job Retention Distance Learning Training** (2002: NIC Accession Number 017699 or 018596). This 32-hour, distance-learning satellite/Internet broadcast program explains the skills, strategies, and resources necessary to address job retention issues and increase employment success for individuals with criminal records. Curriculum materials are available on CD-ROM.

**Thinking for a Change: An Integrated Approach to Changing Offender Behavior** (2002: NIC Accession Number 018311). This 32-hour broadcast program presents an advanced-level course that trains facilitators to deliver the Thinking for a Change program to groups of offenders. Thinking for a Change integrates cognitive approaches for changing behavior by restructuring offenders' thinking and teaching prosocial cognitive skills.

**A Model for Social Justice: Collaboration Between Faith-Based and Community Organizations and Corrections** (2007: NIC Accession Number 022542). This 3-hour distance-learning satellite/Internet broadcast program examines the myths, realities, and benefits of collaboration between corrections and faith-based and community organizations.

**Building Tomorrow's Workforce: An Effective Reentry Strategy** (2008: NIC Accession Number 023255). This 3-hour distance-learning satellite/Internet broadcast program includes a diverse panel of corrections and workforce development professionals, including correctional administrators, policymakers, employers, community agency representatives, and correctional industries professionals.

***Women and Work: Gender Responsivity and Workforce Development (2008: NIC Accession Number 023218).***

This 8-hour distance-learning satellite/Internet broadcast program reviews the policies and practices that impact women and their reentry efforts and various assessment tools that support employment attainment and retention.

***Programs Offered by NIC's E-Learning Center***

The resources listed below can be accessed at <http://nic.learn.com>.

***Workforce Development and Women Offenders (2006: NIC Accession Number 022371).*** This program is for service providers interested in workforce development issues specific to women offenders. It describes the typical characteristics and external barriers that affect the employability of women offenders along with effective interventions. This training program is available as a CD-ROM through the NIC Information Center (800-877-1461; [asknic@nicic.gov](mailto:asknic@nicic.gov)).

***Evidence-Based Practices for Supervisors (2008).***

This program is designed for service providers whose daily responsibilities require direct interaction with offenders and whose agencies have made a commitment to implement evidence-based practices (EBP). The program highlights EBP principles as well as the planning, implementation, and monitoring of EBP for supervisors.

***Podcast***

***George Keiser of NIC Discusses the Relationship Between EBP and Employment (2009).*** This podcast provides an overview in lay language of the relationship between evidence-based practice (EBP) and employment. The podcast is available at [www.nicic.gov/owd](http://www.nicic.gov/owd).

***T/OWD Website***

The T/OWD website offers a wealth of information about NIC's products, programs, and services developed to assist professionals who provide direct services to offenders and ex-offenders. The website can be accessed at [www.nicic.gov/owd](http://www.nicic.gov/owd).

**References**

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## **For More Information**

To learn more about creating a workforce development culture to reduce recidivism, contact:

**National Institute of Corrections**  
Transition and Offender Workforce Development Division  
320 First Street, NW  
Washington, DC 20534  
Francina C. Carter  
Correctional Program Specialist  
Tel: 800-995-6423 ext. 40117  
202-514-0117  
E-mail: [fcarter@bop.gov](mailto:fcarter@bop.gov)  
Website: [www.nicic.gov/owd](http://www.nicic.gov/owd)

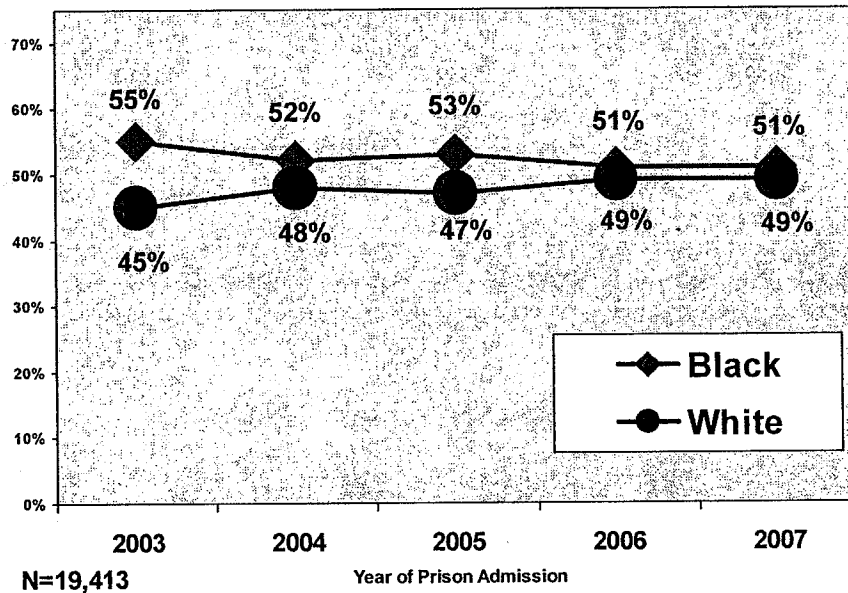
**U.S. Department of Education**  
Office of Vocational and Adult Education  
400 Maryland Avenue, SW  
Washington, DC 20202-7240  
John Linton, Director  
Office of Correctional Education  
Tel: 202-245-6592  
E-mail: [john.linton@ed.gov](mailto:john.linton@ed.gov)

**Community High School of Vermont**  
103 South Main Street  
Waterbury, VT 05676-9506  
Dana Lesperance  
Vocational Education & Workforce Development Chief  
Tel: 802-673-5984 or 802-241-2273  
E-mail: [dana.lesperance@ahs.state.vt.us](mailto:dana.lesperance@ahs.state.vt.us)  
Fax: 802-241-2377



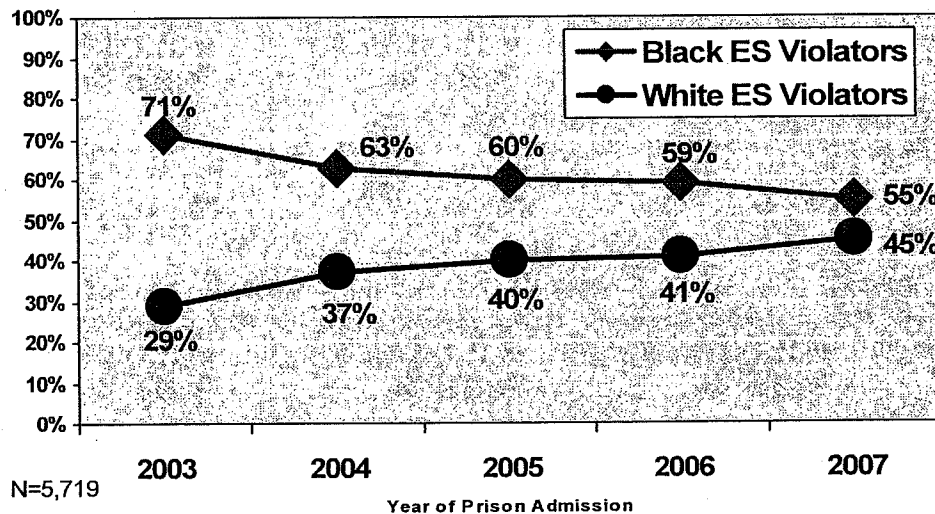
In 2007 blacks made up a smaller segment of the group of offenders admitted to prison with no new sentence than they did in 2003 (Figure 5). This is a statistically significant decrease. By 2007, approximately one-half of the violators admitted to prison with no new sentence were black and one-half were white. The results also revealed that admission to prison with no new sentence for blacks and whites did not vary significantly by supervision region, type of governing offense, or level of criminal risk or criminal need.

**Figure 5: Admissions to Prison With No New Sentence By Race and Year**



Further analyses by violator type (probation/parole/extended supervision/mandatory release) revealed a significant increase in the number of extended supervision (ES) violators returned to prison for both blacks and whites. However, the proportion of the ES violators admitted to prison with no new sentence who were black decreased from 71% in 2003 to 55% in 2007 (Figure 6).

**Figure 6: Extended Supervision (ES) Violators Admitted to Prison with No New Sentence by Race and Year**



Analyses of agent decision-making utilizing the case-level data on 200 randomly sampled cases revealed that there is no indication that agent decisions to file for revocation are being made based upon any inappropriate considerations such as race. There were no statistically significant differences between black and white offenders related to:

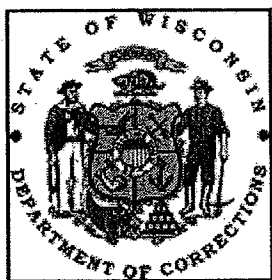
- 1) Whether agent responses to offender behaviors preceding revocation were consistent with the type/severity of offender behaviors and with current agency practice;
  - o Determined by analysis of events in agent narrative chronological log:
    - *Agent use of graduated responses to offender behaviors*
    - *Number of contacts/events in chronological log*
    - *Length of supervision episode and time between events while on supervision*
    - *New offense(s)*
    - *Absconder status triggering revocation*
- 2) Whether agents used graduated responses to offender behaviors prior to revocation; or
- 3) How quickly agents filed for revocation (days from supervision start to agent revocation filing).

There were no statistically significant differences between black and white offenders revoked and admitted to prison with no new sentence with regard to year of prison admission, supervision region, how quickly the revocation hearing was conducted, commission of a new criminal offense, or length of governing offense sentence.

### RECOMMENDATIONS FOR ACTION

The Department should utilize a multi-faceted approach to reducing revocation by choosing from options identified in the best practices review, the results of the current data analyses, and the recommendations of the Justice Reinvestment Initiative.

- 1) Emphasize use of a continuum of non-incarceration intermediate sanctions;
- 2) Increase the consistent use of graduated responses to offender behaviors through continued implementation of the *Functional Response to Violation* grid;
- 3) Improve uniform use of the DOC-502 risk/need assessment tool to focus resources on higher risk offenders and to improve the consistency of agency implementation of the assessment tool;
- 4) Collaborate with existing reentry initiatives, *Assess, Inform, Measure* (AIM) pilots, criminal justice coordinating councils, specialty treatment courts, and the *Treatment Alternatives and Diversion* (TAD) programs to facilitate a coordinated, system-wide partnership;
- 5) Enhance coordination with city/county agencies to facilitate increased use of community-based alternatives to revocation and other treatment and service options prior to revocation;
- 6) Consider changes to policies and practices which would limit the number and type of supervision rules imposed by the courts and agents;
- 7) Collaborate with the judiciary to assess the impact of Truth-In-Sentencing practices on the length of extended supervision sentences and the subsequent effect on prison populations;
- 8) Disseminate relevant study findings to agents through Division of Community Corrections unit supervisors for use in internal quality improvement processes;
- 9) Integrate these results and recommendations with those of the Justice Reinvestment Initiative and the Governor's Commission on Racial Disparities in the Criminal Justice System;
- 10) Consider and prioritize the recommendations to develop a comprehensive, evidence-based approach to reducing revocation that identifies specific areas of focus; and
- 11) Develop an internal action plan based on the approach selected that includes roles, staff responsibilities, and timelines for completion.



- Leadership
  - Office of Legal Counsel
  - Office of Detention Facilities
  - Office of Victim Services
  - Legislative Liaison
  - Public Information Director
- Community Corrections
  - Statement of Principles
  - Regional Offices
  - Community Corrections Offices
- Juvenile Corrections
  - Juvenile Demographics
  - Institutions
  - Community Programs
  - Office of Juvenile Offenders
  - Youth Aids
- Adult Institutions
  - Correctional Centers
  - Institutions
- Management Services
  - Bureau of Budget
  - Bureau of Finance and Administrative Services
  - Bureau of Personnel and Human Relations
  - Bureau of Technology Management
- Parole Commission
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- Special Reports
  - Institution Populations
- Employment Opportunities
- Related Topics
- History
- Vision
- Map
- Frequently Asked Questions
- Search Website



DATE: October 24, 2011

TO: The Wisconsin Senate Committee – Labor, Public Safety, and Urban Affairs

FROM: Annette Harpole, American Citizen and Resident of Racine, Wisconsin



RE: Wisconsin Senate Bill 207 – Oppose Adoption

MEMO

I am opposed to the Wisconsin Legislature adopting Senate Bill 207, a companion bill to Assembly Bill 286. Senate Bill 207 if passed will allow employers to discriminate even more than they do now against employment applicants who have felony records but who have completed their incarceration time. If a person has completed their incarceration time and are deemed ready to re-enter the community, are they not then expected to live as free citizens? If so, how can a person afford housing, food, and help take care of their family if they cannot be hired by anyone? Are we not saying as a State then that we have obeyed the letter of the law and allowed the person to go free – walk away from the penitentiary; however, we are re-incarcerating the person in effect by telling employers on the outside to not hire felons who have completed their sentences. Why is it okay to employ prisoners while they are incarcerated and paid pennies on the dollar for every hour they work? Yet when former inmates are released from prison, it is suddenly not okay to employ them when they could now make a liveable wage? By encouraging employers not to hire former felons, the State is basically encouraging past behaviors that will probably make the person go back to prison. Why would the State want that unless they want to employ them while they are in prison and have employers only pay them pennies on the dollar for every dollar worked — almost like slavery. What is the State's real motivation for not encouraging employers to employ people with felonies upon re-entry into the community? I would like to know.

[illegible]

the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.2 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

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40 Years of Justice

TO: Senate Committee on Labor, Public Safety and Urban Affairs

FROM: Bob Andersen



RE: **Senate Bill 207**, relating to: permitting an employer to refuse to employ or to bar or terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony and preempting cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit activity that is allowed under the state fair employment law.

DATE: October 24, 2011

This memo is written to: (1) correct the misrepresentation that has been repeatedly made during by employer representatives that only 4 - 5 states that have these laws, when, in fact there are at least 11, and that many other states address this in other ways that may be even more restrictive and (2) to highlight the fact that if this bill is enacted, employers will have to maintain three processes for hiring and firing employees – one for minorities (under federal law) for felonies where a relationship test will have to be undertaken, one for non minorities under this bill where a person can be discriminated against based on felony alone, and one for misdemeanants where a relationship test is required under current law.

*As for this second consideration, there is no doubt that minorities are better served under current state law, but there still is a right for minorities under federal law which employers cannot ignore. Since the Equal Rights Division (ERD) administers federal law as well as state law, employers will still have to avoid claims under the ERD, as well as under federal entities, for minorities, by looking at the relationship of the offense to the job in question.*

# **I. There Are in Fact at Least 11 States That Have Adopted Laws like Wisconsin's Law.**

Employer representatives repeatedly testified that there are only 4 states with these kinds of laws, while in truth there are at least 11.

*As I have testified many times on this legislation over the past 10-15 years, there are at least 11 states that have adopted this law, either through statutes or administrative policies. Employer representatives have heard my testimony and I have given them notice of the other states in question several times over the years – yet they persist in misrepresenting the number*

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*of states that have these laws.*

In addition, many other states follow this law through court decisions that follow federal law rulings that discrimination has a "disparate effect" on minorities and is therefore race discrimination – unless there has been a determination made of "business necessity" for the action ("business necessity" essentially is a question of the relationship of the offense to the job – see below).

Below are the states involved and the actions they have taken. As the employer representatives testified at the hearing, they do not know of any of these states who have repealed their laws. Neither do we.

Here are the states. Most use some form of "substantial relationship" or "direct relationship" test. Some states' laws are even tougher than Wisconsin's law.

Several states fair employment agencies and courts have issued decisions based on "disparate effect." Some have included "disparate effect" in their administrative rules or statutes, e.g. Iowa. In addition, at least the following several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

Delaware recently enacted a law lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.

Illinois recently enacted a law that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.

Illinois Commission Guidelines have also been in existence for some time and have the force of law and, similar to Wisconsin law, broadly prohibit discrimination in the absence of some showing of a relationship between the offense and the job:

"Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefor unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals



the individual as objectively unfit for the job." [emphasis added]

Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.

New York statutes prohibit discrimination by any employer based on the applicant or employee having committed a criminal offense, without allowing employers any exception.

Washington prohibits discrimination by any employer on the basis of conviction records, except for those related to a particular job which are less than 7 years old, under regulations issued by the Washington State Human Rights Commission.

Minnesota provides that consideration of a criminal record by a private employer cannot be an absolute bar to employment and that the job-relatedness of the crime must be considered, under the administrative policies set forth in the Minnesota Department of Human Rights Pre-Employment Inquiry Guide. The guide is not an administrative rule, but the effect is the same, since it would be risky to ignore it, because it is the state agency's interpretation of state law.

Colorado's Civil Rights Commission similarly has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

Ohio's Civil Rights Commission pre-employment guide similarly advises employers that even any inquiry into convictions of applicants for jobs is unlawful, without any reference to "substantial relationship."

Connecticut statutes prohibit state employers from discriminating based on conviction record, unless the employer considers all of the following: (1) the relationship of the crime to the job; (2) the rehabilitation of the applicant or employee; and (3) the time that has elapsed since the conviction or release of the applicant from prison or jail.

Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is directly related to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.



2. **If SB 207 is Enacted, Employers Will Have to Maintain Three Processes for Hiring and Firing Employees – One for Minorities, Where a Business Necessity or Relationship Test Must be Shown Regarding the Felony Conviction, a Second One for Non Minorities for felonies Under This Bill, Where Felony Status Alone Will Disqualify the Person, and a Third for Misdemeanants, Where a Relationship Test is Required Under Current Law.**

Current law is a codification of decisions of the U.S. Supreme Court, federal and state courts, the Equal Employment Opportunities Commission (EEOC) and the state Equal Rights Division (ERD), holding that discrimination against minorities on the basis of conviction record, in the absence of “business necessity,” constitutes race discrimination – the enactment of AB 286 will not change this law.

*Attorneys who represent employers have testified at this hearing and at previous hearings on this legislation that they will continue to advise their clients to comply with the federal requirements under Title VII of the Civil Rights Act of 1964, when considering the employment of minorities. Federal law requires employers to look at business necessity or a relationship test, when addressing the employment of minorities.*

Current *state* law stems from these federal decisions.

**In a way, what current state law does is to extend to non minorities the protections that exist for minorities under federal law. One of the considerations in the enactment of this law was the avoidance of reverse discrimination.** It is possible that a *non minority* would be able to bring a claim under the Equal Protection Clause, for not having the same protection as does a minority.

*In any event, the state legislature cannot do anything to diminish the right that a minority has under federal law. An employer would be foolish to refuse to hire or to fire a minority person solely because the person has a felony record.*

*As a result, if this bill is enacted, employers will have to maintain two processes for hiring and firing employees: one for minorities that continues to look at a relationship test or a business necessity test, when considering minorities, and one for non minorities, which allows a consideration of felony record alone.*

*In this regard, this bill actually will do a disservice to employers who rely on it and who look no further than a minority person’s felony record. Such an employer will easily expose itself to liability by not conducting some scrutiny regarding business necessity or a relationship test, in its treatment of a minority person.*

An employer better served under current law, where it would not be misled into a false sense of security. And the test under state law -- “substantial relationship” -- is arguably not as restrictive as is the “business necessity” or job-relatedness test under federal law.



The U.S. Supreme Court ruled in Griggs v. Power Co., 401 U.S. 424 (1971), that discrimination based on circumstances which have a "disparate effect" on persons because of their race or national origin, *is in fact* discrimination based on race or national origin and is prohibited by Title VII of the Civil Rights Act of 1964, *in the absence of a showing of "business necessity"* in a particular case. This decision was followed by a number of federal and state court decisions, and decisions of the EEOC and ERD, in ruling that discrimination based on criminal record for minorities is *in fact* discrimination based on race or national origin, in violation of Title VII of the Civil Rights Act of 1964. This is so, because minorities have a greatly disproportionate record of convictions. The federal court decisions include decisions in this circuit for Wisconsin. The logic, then, is that to refuse employment or to take other adverse job treatment of a minority because of a record of conviction, without an adequate business reason, is *in fact* an adverse treatment of an employee because of race or national origin. It is racial discrimination in violation of Title VII.

The Equal Employment Opportunities Commission (EEOC) states in its guidelines that an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

"To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related."

Even if AB 286 is enacted, minorities will continue to be able to process complaints through either the state Equal Rights Division or through EEOC, as they do now. Where minorities are discriminated against based on felony records, employers will have the burden of showing that their hiring or firing decisions are due to "business necessity" or that there is some job relatedness between the conviction and the job sought – in accordance with federal law requirements, notwithstanding the enactment of AB 286.

Of course, employers will still be required to determine whether there is a substantial relationship between the circumstances of the offense and the circumstances of the offense in misdemeanor cases.

Thank you for your consideration.



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**LEGAL Action**  
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*40 Years of Justice*

TO: Senate Committee on Labor, Public Safety, and Urban Affairs

FROM: Sheila Sullivan, Legal Action of Wisconsin, Road to Opportunity Project

RE: 2011 Senate Bill 207 permitting private employers to refuse to employ or to terminate from employment unpardoned felons even if the circumstances of the felony do not substantially relate to the circumstances of the job applied for or held and preempting cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit activity that is allowed under the state fair employment law

DATE: October 24, 2011

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide civil legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. LAW operates a project directed at removing legal barriers to employment, the Road to Opportunity Project, which provides direct representation to individuals with criminal records trying to find and keep family-sustaining jobs.

## INTRODUCTION

AB 286 is a bad idea legally and as public policy. If AB 286 becomes law, it will create uncertainty and encourage litigation at a substantial cost to Wisconsin businesses. It will increase the racially disproportionate effect of arrest and conviction records, worsen recidivism, and contribute to rising costs in our judicial, public benefits, and corrections systems. It will also hasten the deterioration of the skilled, diverse, and well-educated workforce that is necessary to attract and retain employers in this state.

*I. 2011 AB 286 will encourage litigation and increase uncertainty, raising legal costs for businesses operating in Wisconsin.*

Assembly Bill 286 does away with the requirement that Wisconsin businesses look at individual conviction records before denying someone a job based on that record. That simple requirement has sent a message to Wisconsin employers that blanket employment bars, based solely on the fact of a conviction, are likely to be unlawful. The passage of this bill will send the

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solely on the fact of a conviction, are likely to be unlawful. The passage of this bill will send the opposite message, encouraging employers to adopt such bars to save themselves time and trouble.

The problem is, of course, as Bob Anderson has testified in the past, that a change in state anti-discrimination law will not protect employers who adopt such policies from violating federal law, in particular from violating Title VII of the Federal Civil Rights Act. These violations of federal law will result in increased litigation costs for businesses and our courts.

Title VII makes it unlawful for an employer "to limit . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's [\*\*17] race . . . ." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Federal courts have interpreted that phrase to prohibit employment practices that have a racially disparate impact on employment opportunity. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982).

In *Griggs v. Power Co.*, 401 U.S. 424 (1971), the United States Supreme Court held that discrimination based on circumstances which have a "disparate effect" on person because of their race or national origin, is in fact discrimination based on race or national origin and is prohibited by Title VII of the Civil Rights Act of 1964, in the absence of a showing of "business necessity." This decision was followed by a number of federal and state court decisions, and decisions of the EEOC, affirming that discrimination based on the criminal records of minority can violate Title VII because minorities have a greatly disproportionate arrest and conviction rate. Racial discrimination in employment, whether through racially disparate treatment or through policies that have a racially disparate impact continues remains prohibited by federal law—whether that discrimination is by a state actor or a private employer.

According to Equal Employment Opportunities Commission (EEOC) guidelines, an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related.

It will thus generally be unlawful for private employers to adopt blanket or automatic exclusions based on (for example) the mere fact one was once convicted of a felony. Such policies would, at the very least, provide a basis for a federal law suit or a federal class action based on a disparate impact theory.



If AB 286 is passed, businesses will face new uncertainty. Abolition of state-law prohibitions against non-individualized employment policies invites the creation of new hiring policies, employment applications, and other screening tools. Federal law and existing precedent would suggest that blanket criminal records policies could not be applied to minority candidates. In theory, it would be possible to create a two track employment screening system, where the records of felons of color would be scrutinized individually and non-minority felon applicants would be automatically barred. But such a policy might well constitute racially disparate treatment, which is prohibited by Title VII.

Policies of either sort might subject those who adopt them to suit in federal court or to agency action from the Federal Government which has sent very strong messages that it is interested in enforcing federal antidiscrimination laws in this context. I have included with this comment a recent docket sheet taken from the NELP website identifying a number of federal cases, some of which have recently been settled, which have been allowed to proceed based on a disparate impact theory. The docket sheet also shows related administrative actions and federal cases involving the Fair Credit Reporting Act and criminal background checks. As the docket sheet suggests, there has been a sharp increase in law suits and enforcement actions focused on the racially discriminatory use of criminal records.

Uncertainty in law always creates cost and encourages litigation. If employers are encouraged by the passage of AB 286 to adopt more blanket exclusionary hiring policies, those employers may find themselves subject to time-consuming and expensive federal litigation—and the bad publicity attendant to claims of racial discrimination. Even those businesses that decide not to change their policies will probably have to reassess policies, application forms, and other screening metrics that had been tested by practice and which employees could be reasonably certain were lawful under Wisconsin's Fair Employment law. That kind of reassessment also constitutes a cost.

For all these reasons, AB 286 is bad for Wisconsin businesses.

II. *New costs will be imposed on businesses in order to amend a law that has not burdened employers significantly.*

Under the relevant provisions of Wisconsin's current Fair Employment Law, public and private employers may refuse to hire a job applicant, or may terminate an employee, on the basis of *any conviction record*, if there is a *substantial relationship* between the *circumstances* of that *offense* and the *circumstances of the particular job*. Employers are thus perfectly free not to hire or to fire otherwise qualified persons based on a criminal record under well understood conditions. The substantial relationship exception to the Fair Employment Law was adopted, and has been retained, because it appears to promote two powerful public policy interests: the interest in promoting rehabilitation and the interest in allowing employers to consider the actual circumstances of an offense in determining whether an applicant for a particular job might present a risk if employed in that job.



Nothing in our current Fair Employment Law requires an employer to hire a person with any kind of conviction, let alone any felony conviction. The law effectively prohibits only one kind of discrimination, the automatic rejection of an applicant or an employee based on a check box or a one word answer to the question: have you ever been convicted of a crime?

The cost to employers of requiring this modicum of individual consideration is very small—in terms of time. And we have ample evidence, from our long experience with the law, the minimal protections of Wisconsin's Fair Employment Law have not created a wave of legal action in costly forums.

Job applicants or employees who believe they have been discriminated against based on their arrest and conviction records must exhaust their administrative remedies before embarking on legal challenges in court. Administrative hearings are typically significantly less expensive for employers than state—and certainly federal court actions—. Complainants are often unrepresented, costly discovery is limited, the hearings themselves are generally short. In 2010, according to LIRC statistics, there were 122 appeals of initial decisions to LIRC, of those 122 cases—only 13 involved arrest/conviction discrimination claims. No decisions issued in that year found discrimination. In 2009, of the 118 equal rights appeals filed with LIRC, 12 were based on claims of arrest or conviction discrimination: discrimination was found in only 9% of the 118 total cases. The numbers are roughly similar in 2008 and 2007, 96 and 101 cases, 17 and 9 in which the issue was a claim of records discrimination, and only 4 % and 5% of total decisions finding discrimination. I have included copies of these statistical summaries with my comments.

Considering the thousands and thousands of hiring and termination decisions made between 2007 and 2010, those statistics make it clear that the records provisions of Wisconsin's Fair Employment law is **not** creating significant litigation costs for business and that employers **have** created policies, job applications, and screening devices that make it relatively simply to abide by the current law and make independent and well-informed hiring choices.

Equally important, the current law sends a message that ex-offenders with good credentials (and records that do not indicate a risk of reoffending if employed in a particular job) should not automatically be disqualified from consideration for employment.

Passing AB 286 will not only create legal costs and uncertainty for businesses operating in Wisconsin, it will repudiate that message. To make matters worse, the law will create or increase costs for exoffenders, minority communities, and taxpayers.

*III. Encouraging employers to automatically deny jobs to job applicants, or fire existing employees, based solely on the fact of their felony conviction will make it more difficult for felons trying to re-enter their communities, support their families, and become contributing*



*members of society increasing costs to them and to taxpayers.*

To understand the costs to individual ex-offenders and our state, we must first understand who this bill would directly affect. 65 million Americans, 1 in every four adults, now have a criminal record. See *"65 Million Need not Apply: the Case for reforming Criminal Background Checks for Employment"* (Attached).

While the precise number of felons in the nation, and in our state, is difficult to precisely identify, we know it is large and growing. In 2000, social scientists estimated that there were more than 12 million ex-felons in the United States, constituting more than 8% of the working age population. (Uggen, Thompson, and Manxza 2000). According to Bureau of Justice Statistics, between 1994 and 2004, the number of felony convictions in State courts increased 24%. See <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=909>. In 2004 alone, 1,078, 920 people were convicted of felonies. 40 % of those convicted of felonies in that year were under 30. We know that rates of felony convictions have continued to increase in the last 5 years. What these statistics tell us is that every year, Wisconsin creates more felons who will leave prison, at a relatively young age, and who will either recidivate or become part of our community with greater or lesser success.

We also know that who is labeled a felon has changed dramatically in the past decades. The category felon was once associated primarily with habitual offenders and/or those who committed violent crimes. Today, the majority of felony convictions are for drug crimes, including possession, and non-violent property offenses.

Wisconsin is fairly typical of how the category of felon has been expanded in the past decades. The number of felonies in Wisconsin has increased in several ways.. Some charges that were once classified as misdemeanors have been reclassified as felonies. Wis. Stat. 939.50 thus now lists nine different classes of felonies—extending the range of “felonious behavior” downward. The following offenses are felonies under WI law: possession of controlled substances (which accounts for the great majority of criminal offenses); \$500 or more damage to a coin operated machine; graffiti to a sign of a public utility or common carrier; graffiti damage to any other person’s property that exceeds \$2500; operating a vehicle without the consent of the driver; removal of a part of a vehicle without the owner's consent; issuance of a check for more than \$2,500 with insufficient funds in an account; forgery; property damage to a public utility; stalking with the use of public records or electronic information; threat to accuse another of a crime; theft of property in excess of \$2,500; threat to communicate derogatory information; receiving or concealing stolen property of a value in excess of \$2,500; distribution of obscene materials; solicitation of prostitution; conducting an unlawful lottery; bribery; bribing a public official; possession of burglary tools with the intent to enter a room or building designed to keep valuables; providing special privileges to a public official in return for favorable treatment; theft of cable or satellite services; theft or fraud against a financial institution of more than \$500; cohabitation with another by a married person; failure to pay child support for 120 days; action by a public official to take advantage of office to purchase property at less than full value;

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interference with the custody of a child for more than 12 hours; perjury; false swearing; destruction of public documents subject to subpoena; making a communication to influence a juror; fraud on a hotel or restaurant owner in excess of \$2,500; transferring real or personal property known to be subject to a security interest; threatening to impede the delivery of an article or commodity of a business; damage to mortgaged property in excess of \$2,500; threatening to influence a public official to injure a business; falsification of records by an officer of a corporation; destruction of corporate books by an officer of the corporation; fraudulent use of credit cards; theft of telecommunications services, cellular telephone services, or cable TV services for the purpose of financial gain; modifying or destroying computer data to obtain property; adultery; incest; theft of library materials of a value in excess of \$2,500; criminal slander of title of real or personal property; flag desecration; theft of trade secrets; retail theft of a value in excess of \$2,500 and a variety of other offenses including the kinds of crimes—murder, rape, armed robbery, drug trafficking, and similar offenses most often associated with the label felon.

Given the expansion of the category of felon, and its increasing application to non-violent offenses, it is unsurprising that more and more Wisconsin citizens will become convicted felons at a relatively young age and will return, to live in our communities, after relatively short periods of incarceration. In their 2001 article, "The Labor Consequences of Incarceration," Princeton University Department of Economics Professors Bruce Western, Jeffrey Kling, and David Weiman note that on a given day 29% of young African American male high school dropouts ages 22-30, were employed, while 41% (up from 26% in 1990) were in prison. Ex-offenders who do get jobs start work making 10-30% less than other African American high school dropouts. The same article observed that without adequate jobs, ex-offenders are unable to pay court costs that come out of their convictions, restitution to victims, and child support for their families.

Recidivism or repeated criminality is costly in a variety of ways. Most crime has a direct cost—the value of goods stolen, property destroyed, secondary costs—to maintain prisons and the criminal justice system, and larger social costs—in the form of lost human capital, workers who are not working, children who are not supported by their parents.

AB 286 will increase those costs by making it more difficult for felons who have completed their sentences to get work when they are released from jail or prison and more difficult over time to maintain the kind of steady employment necessary to escape poverty.

Bureau of Justice Statistics indicate that roughly two-thirds of released felons will be charged with new crimes and over 40% will return to prison (either because of probation violations or new convictions) within three years. While these statistics may seem frightening, we need to pay attention to their causes. In addition to mental health and substance abuse issues, experience with the criminal justice system in and of itself has adverse consequences, limiting employment opportunities and earnings potential—the strongest predictors of recidivism. See 939 AJS Volume 108 Number 5 (March 2003) 937-75, Devah Pager, *The Mark of a Criminal*



Record (Attached).

According to many scholars, criminal records act as a form of "negative credentialing" certifying certain individuals for discrimination or social exclusion. This negative credentialing includes legal bars to employment or licensure, felon disenfranchisement, and less direct forms of stigma creation such as the wide-spread and permanent availability of criminal background information and the exclusion of felons from anti-discrimination protections. See Pager at 942.

To the extent the passage of AB 286 would encourage greater exclusion of felons from the work force, not just initially, but perpetually it will strengthen the effect of negative credentialing.

In 2003, Professor Devah Pager studied the effects of criminal records on job applicants through a Wisconsin based study using an audit methodology. The study used two black and two white subjects to test the effects of a hypothetical criminal conviction in the initial stage of a job application. *Id.* at 948-9. (Studies have shown that the effect of a record is most significant at the first stage of the employment process). *Id.* at 948' see Devah Pager, Bruce Western, and Naomi Sugie, 623 *Annals* 195 (May 2009), "Sequencing Disadvantage: Barriers to Employment facing Young Black and White Men with Criminal Records." They were all 23 year old Milwaukee College students of the same physical appearance, Pager, *Mark*, at 947. In test applications, one of the black pair and one of the white pair would be assigned a criminal record, the other member of the pair would have no record. *Id.* The work experience, educational levels, and other personal characteristics of the testers were the same: the crime was felony possession with intent to distribute. *Id.*

The effects were profound for both white and black test subjects. The audit study showed that having a criminal record reduced the likelihood of a callback for the white subjects 50%--a large and significant effect. *Id.* at 955. Despite the fact that the white applicant with a record was equally qualified as the white applicant without a record.

The effect for the "identical" black applicant pairs was even more striking. The black applicant with a criminal record was 40% more disadvantaged, in this test, than the white subject with a criminal record. *Id.* 959. (The white applicant with a criminal record received more callbacks (17%) than the black applicant without a criminal record (14%)). *Id.* at 958.

Pager's study is important because it provides empirical evidence of how persistently a criminal record disadvantages job applicants and how much more powerful that disadvantage is for non-white offenders. Later studies using the audit methodology have confirmed similar patterns in other cities and states. The studies indicate that the effect of a criminal record is dissipated to some extent by personal contact and information beyond the mere fact of conviction.

Because AB 286 encourages blanket bars and exclusions, and diminishes the legal



Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.

New York statutes prohibit discrimination by any employer based on the applicant or employee having committed a criminal offense, without allowing employers any exception.

Washington prohibits discrimination by any employer on the basis of conviction records, except for those related to a particular job which are less than 7 years old, under regulations issued by the Washington State Human Rights Commission.

Minnesota provides that consideration of a criminal record by a private employer cannot be an absolute bar to employment and that the job-relatedness of the crime must be considered, under the administrative policies set forth in the Minnesota Department of Human Rights Pre-Employment Inquiry Guide. The guide is not an administrative rule, but the effect is the same, since it would be risky to ignore it, because it is the state agency's interpretation of state law.

Colorado's Civil Rights Commission has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

Ohio's Civil Rights Commission pre-employment guide similarly advises employers that even any inquiry into convictions of applicants for jobs is unlawful, without any reference to "substantial relationship."

Connecticut statutes prohibit state employers from discriminating based on conviction record, unless the employer considers all of the following: (1) the relationship of the crime to the job; (2) the rehabilitation of the applicant or employee; and (3) the time that has elapsed since the conviction or release of the applicant from prison or jail.

Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is directly related to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.

Municipalities and individual cities have joined the movement, enacting "ban the box" ordinances, requiring that criminal record checks not be done until after candidates for



responsibility to make individual determination it will therefore certainly increase the negative credentialing associated even with old criminal convictions, decreasing employment and increasing social isolation. Those effects will encourage recidivism at the front end—with its attendant costs—and even for those who do not reoffend will tend to make employment hard to find, irregular, and low-paying. A recipe for keeping ex-offenders and their families below the poverty line and dependant on government services.

IV. *Across the country, states, counties, and cities are recognizing and seeking to respond to the problem of negative credentialing.*

Other states are increasingly recognizing the effects of negative credentialing, and the disparate racial effects of criminal record histories.

Some state employment agencies and courts have recognized the significance of "disparate effect" in their administrative rules or statutes, e.g. Iowa. Several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

*Delaware enacted a law last year lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.*

*Illinois enacted a law this year that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.*

*Illinois Commission Guidelines also have been existence for some time and have the force of law and similarly applies to all employers:*

"Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefore unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals the individual as objectively unfit for the job."  
[emphasis added]



employment have been through initial screenings—the point would be to identify desirable candidates before deciding how to weigh the significance of a possible criminal record. I should not that the proposed law you are considering would also prohibit what many counties and cities have insisted they need—the ability to respond locally to the problems of exoffenders in particular communities.

V. *AB 286 represents a movement in the wrong direction.*

AB 286 represents a movement against the grain—both with respect to other states and the federal government. It will increase front end discrimination against felons, and increase the negative credentialing that is so costly to individuals, communities, employers, and taxpayers. To the extent AB 286 encourages employers to ignore the factors the EEOC identifies as critical to business necessity—the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought"—, it encourages hiring and employment models based on irrational fears, prejudices, and assumptions about risk that are not factually based. In the past five years, a number of scholars have used longitudinal studies to assess the relationship between criminal arrests and convictions and probabilities of reoffending. I have included a sample study from 2008 by Kiminori Nakamura whose later work with Dr. Alfred Blumstein has been central in this area. What all of those studies show is that after a certain period of non-offending, which depends on a variety of factors including the nature of the offense and the age of the offender, a convicted person's likelihood of reoffending falls to a level statistically indistinguishable from that of an individual who has never offended.

This scientific work, while still being developed, provides further, powerful evidence that blanket and non-individualized hiring policies which make convictions for a generic category of offense—such as a felony—an absolute bar to employment are not just costly but ineffective as a method of employer risk control.

### CONCLUSION

There are legitimate arguments about where we should focus the state's limited resources to best deal with the social and economic consequences of the flow of exoffenders back into our communities. But there is no reasonable argument that we need a law that will change the status quo in a way that increases costs to the state, to private employers, to minority communities, to ex-offenders, and to taxpayers without producing any tangible benefits to anyone. I therefore urge you to vote against AB 286.



## HOW OTHER STATES ARE RESPONDING

### (1) **Inventories of Collateral Consequences**

- Florida Senate Bill 146 (enacted 2011)
- North Carolina
- The Ohio CIVICC Database (2011)

### (2) **Fair Hiring and Occupational Licensing Standards**

#### *Ban the box*

- Massachusetts Senate Bill 2583 (enacted 2010)
- Connecticut House Bill 5207 (enacted 2010)
- New Mexico Senate Bill 254 (enacted 2010)
- North Carolina Senate Bill 509 (did not pass 2011)

#### *Waiver and appeals*

- California Senate Bill 1055 (enacted 2010)
- Delaware Senate Bill 59 (enacted 2011)(limits automatic bar periods in felonies, for with misdemeanors' makes it possible to grant waivers for substantially related offenses)

### (3) **Expungement and Sealing of Criminal Records**

- Arkansas House Bill 1608 (enacted 2011)
- Colorado House Bill 1167 (enacted 2011)(sealing certain drug convictions; employers (some) cannot force disclosure)
- Delaware House Bill 169 (enacted 2010)
- Indiana House Bill 1211 (enacted 2011)
- Louisiana House Bill 102 and House Bill 927 (enacted 2010)
- Oregon House Bill 3376 (enacted 2011)
- Mississippi House Bill 160 (enacted 2010)
- Rhode Island House Bill 7923 and Senate Bill 2646 (enacted 2010)
- South Dakota House Bill 1105 (enacted 2010)
- Utah House Bill 21 (enacted 2010)

### (4) **Restoration of Civil Rights and Eligibility for Employment and Occupational Licensing (certificates of good conduct, certificates of rehabilitation)**

- Florida Senate Bill 146 (enacted 2011)
- North Carolina House Bill 641 (enacted 2011)



- Ohio House Bill 86 (enacted 2011)
- (5) Securing Identification Documents (birth certificates, drivers license, other ID)**

- Colorado Senate Bill 6
- Virginia House Bill 1161
- Kentucky House Bill 428 (enacted 2010)
- New York Assembly Bill 9706 (enacted 2010)
- Nevada Senate Bill 159 (enacted 2011)

**(6) Reducing Child Support Arrearages**

- New York Assembly Bill 8178 (enacted 2009)

**(7) Training and Job Placement for Affected Populations**

- Arkansas Senate Bill 806 (enacted 2011)
- Colorado House Bill 1112 (enacted 2010)
- Iowa House Bill 2522 (enacted 2010)
- Idaho Senate Bill 1030 (enacted 2011)
- North Carolina House Bill 233 (eligible for 2012 session)

**(8) Employer Negligent Hiring Protections**

- Colorado House Bill 10-1023 (enacted 2010)
- Massachusetts Senate Bill 2583 (enacted 2010)
- North Carolina House Bill 641 (enacted 2011)
- Arkansas Senate Bill 806 (enacted 2011)

**(9) Anti-discrimination laws**

- Arkansas Senate Bill 806 (enacted 2011)( "The Arkansas Restorative Justice Responsibility Act").

**LAWS LIMITING EMPLOYMENT**

**(1) Employment Bans**

- Florida House Bill 7069 (enacted 2010) (caregiver focused; specified offenses are barring; agencies can grant waiver after period of time)
- Pennsylvania House Bill 1352 (enacted 2011)(5 and 10 year bars, enumerated offenses, educational institutions)

**(2) Sex Offenses**

- Pennsylvania House Bill 123 (pending 2011)
- New York Assembly Bill 4151 (pending 2011)  
(enacted 2011)



To: Members, Senate Committee on Labor, Public Safety, and Urban Affairs

From: Attorney Colin Good  
Board Member, Public Interest Law Section, State Bar of Wisconsin  
Hawks Quindel, S.C., (608) 257-0040

Re: Opposition to Senate Bill 207 (employment discrimination)

Date: October 24, 2011

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I oppose Senate Bill 207 because the State of Wisconsin is not spending significant administrative resources to determine if employers are unlawfully discriminating against applicants and employees.

The Fiscal Estimate accompanying SB 207 maintains that “[t]he State spends an intangible amount of administrative resources determining if felony conviction of job applications and employees are job related under current law. This proposal might reduce that effort.” However, the Equal Rights Division has received a total of 2,463 complaints this year, 245 of which were discrimination complaints based on conviction record.<sup>1</sup> As such, discrimination complaints on the basis of conviction records constitute only nine percent (9%) of the total civil rights cases handled by the Equal Rights Division so far this year. Historically speaking, the Equal Rights Division advances less than twenty-five percent (25%) of its complaints to a hearing.<sup>2</sup> That means that less than sixty-two (62) individuals who file a conviction record complaint will receive a hearing on the merits of their case.

Moreover, less than two percent (2%) of the Equal Rights Division’s civil rights cases are appealed to the Labor and Industry Review Commission and less than one-half of one percent (.005%) to Circuit Court.<sup>3</sup> Simply put, the State is not spending significant administrative resources to determine if employers are unlawfully discriminating against applicants and employees.

What resources the State is spending should be weighed against the social costs of legislating discrimination against its citizens. There were approximately 17,817 prisoners under Wisconsin’s jurisdiction in 2008, forty-three percent (43%) of whom were black.<sup>4</sup> When these prisoners have paid their debt to society, this legislation would effectively punish them twice for the same crime and at a higher rate for minorities. Employment of offenders plays an important role in reintegrating them back into the community and reducing recidivism. Penalizing felons for trying to find work will only serve to exacerbate the rates of recidivism and deteriorate the social fabric of our communities. Wisconsin must not countenance the discriminatory impact this legislation will engender.

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<sup>1</sup> Open Records Request, October 18, 2011. (See attached)

<sup>2</sup> Department of Workforce Development, Biennial Reports, 2001-2009.

<sup>3</sup> Id.

<sup>4</sup> John Hejduk and Peters Wagner, “Importing Constituents: Prisoners and Political Clout in Wisconsin” March 2008.





# WMC

WISCONSIN'S BUSINESS VOICE SINCE 1911

TO: Members of the Senate Committee on Labor, Public Safety, and Urban Affairs

FROM: Jason Culotta, Director of Civil Justice Policy

DATE: October 24, 2011

RE: Senate Bill 207 – Conviction Records as a Protected Class under WFEA

### **Providing a Safe Workplace**

Chapter 101.11 of the state statutes requires employers to provide a safe work environment for employees, vendors, and customers. Employers need to conduct background checks of potential employees in order to ensure a safe place of employment. Some applicants choose not to disclose their felony convictions; when that status is eventually revealed, they can be terminated for falsifying their application.

Under the safe workplace statute, a responsible employer has the duty to be aware of the criminal records of their employees. The employer will need to defend either the hiring decision or the failure to hire.

### **WMC Position**

This legislation would remove felony conviction records from the list of protected classes under the Wisconsin Fair Employment Act (WFEA).

One frustration for employers is that when they receive multiple applications and choose to hire an applicant without a felony record, they may have to defend their decision not to hire the felon. This is even the case when it was a legitimate hiring decision to hire the chosen applicant.

Another frustration is that there is no “safe harbor” where an employer can choose not to hire a person with a felony record and not have that decision challenged. There are occupational areas defined by statute in the health care field where the Legislature has told employers that they are forbidden by law from hiring certain persons with certain criminal records. However, there are a wide range of occupational areas not covered by statute where an employer should not be required to consider persons with felony records for employment.

A third frustration is that an employer does not know they have violated a law until an administrative law judge (ALJ) tells them that they have violated the law. For instance, an employer may reject an application from ten different individuals on ten separate occasions for ten different jobs. Yet, on the eleventh application for another job, the employer may go through the same process of reasoning but find out at the end of litigation that their decision is “discriminatory” in the view of one ALJ.

This final frustration applies to WFEA litigation in general. Claims are costly to defend from the employer's perspective. For example, an employer may spend \$30,000 in legal fees to find out that they did not discriminate, yet they cannot collect legal fees from the person who alleged discrimination. If the employer loses, he or she can be held liable for the legal costs of the applicant, so it is a one-way street.

### **Conclusion**

For these reasons, WMC urges the Committee to support SB 207.



Anthony Williams

Good afternoon america...Senate bill 286...is the personification of oppression in 2012...its a bill that has reached the table...of the wisconsin senate...without the permission of the people...that permits...employers the right...the right to discriminate...against felons...depriving them of the opportunity...to be an american...not only does it allow employers the right...to refuse consideration...for employments...it gives them the right...to terminate employment of current employees...it doesn't matter if you're a janitor or a doctor...it doesn't matter if you've been working diligently for 1 or 20 years...our law makers wanna give employers the right...to take jobs.....&opportunities to provide for their families from americans...these people have repaid their debts to society..based on our judicial system &lost their right bare arms...&in most cases...vote...but...what..about human rights?? We the people will not allow the powers that be..to continue to disenfranchise &oppress those attempting to redeem themselves..as americans...this great country is tired...of our politicians...dressing up capitalism &calling it democracy...we demand transparency &equality from the officials we elect &the companies we support...america has walked onthe back of the lower &middle class for far too long...we tired...of corruption...oppression...&war...we want justice..we are tired...of fighting one another for jobs...while the 1% lounge on yachts parlaying in comfort...I say we...cuz this doesn't just affect me...you all...whether you realize or not...are the 99%...cuz after the felons...they're coming for you next...your jobs...your stability...your rights...so you can either wait...for your feet to fall from beneath you...or speak...&stand..&fight..for yourselves...for your children...for the people...thank you...





## WISCONSIN CATHOLIC CONFERENCE

TO: Members, Senate Committee on Labor, Public Safety, and Urban Affairs

FROM: Barbara Sella, Associate Director

DATE: October 24, 2011

RE: Senate Bill 207, Employment of Unpardoned Felons

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The Wisconsin Catholic Conference (WCC) thanks you for the opportunity to submit testimony in opposition to Senate Bill 207, which would permit employers to terminate or refuse to employ any person convicted of an unpardoned felony.

Our stance on criminal justice issues is guided by the social teaching of the Catholic Church and the insights gained from long experience ministering to prisoners, ex-offenders, crime victims and their families. Several principles of Catholic teaching lead us to oppose this bill: 1) respect for the human person, 2) common good, 3) option for the poor and marginalized, 4) solidarity, and 5) reconciliation and rehabilitation.

Our experience in the Department of Corrections' (DOC) Religious Practices Advisory Committee (RPAC) and the Church's direct ministry confirm what research has demonstrated, namely that offenders with the best chance of rehabilitation are those who have a caring family, a supportive faith community, and gainful employment. (The RPAC, of which the WCC is a founding member, includes DOC staff and representatives of other faith communities. It has been meeting regularly for about a decade to advise the DOC on issues of religious liberty and prisoner reintegration, as well as to learn from the DOC about the specific challenges facing prison staff and offenders.)

Church volunteers of all denominations who work in prisons and in the community are instrumental in helping reconcile and rehabilitate ex-offenders. But in order to be most effective, they need the support of our laws and our communities. Passage of SB 207 will make their efforts more difficult because it sends a negative message. It will make currently employed ex-felons fear that they can be terminated at will and diminish the hopes of those who seek employment.

In our view, the common good is served best when an ex-felon is encouraged to find a good job. Children of ex-felons benefit when their parents are working. Public safety is enhanced as stable employment reduces the risk of recidivism. Taxpayers save money when the prison population decreases. At-risk youth are given hope when they see ex-felons who are dedicated to honest employment rather than indolence or crime.

Another serious problem we see with this bill is that it could disproportionately affect minorities. Though they comprise only about six percent of our state's population, African Americans account for nearly half of our state's prison population. Enacting SB 207 may unwittingly serve to increase disparities for some of our poorest and most marginalized residents.

Respect for human dignity requires that people have the opportunity for and the responsibility of productive work. We believe current law does just that. While giving employers the discretion to deny work to those whose past conduct is relevant to their employment, it sends the powerful message to ex-offenders that society wants them – indeed expects them – to secure lawful employment.

Laws serve not just to punish wrongdoing, but also to guide society towards its highest goals. The Wisconsin Fair Employment Act (WFEA) achieves this dual purpose and we see no compelling reason to change it.

For all these reasons, we urge you not to advance SB 207.

**CIVIL RIGHTS & LIBERTIES SECTION**  
**PUBLIC INTEREST LAW SECTION**

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October 21, 2011

TO: Members, Senate Committee on Labor , Public Safety and Urban Affairs

FROM: Attorney Sally Stix, Chair  
Civil Rights and Liberties Section, State Bar of Wisconsin

Attorney Stacia R. Conneely  
Chair, Public Interest Law Section, State Bar of Wisconsin

RE: Opposition to Senate Bill 207 (employment discrimination)

The Civil Rights and Liberties Section and the Public Interest Law Section of the State Bar of Wisconsin oppose Senate Bill 207 because it would close the doors to employment opportunities for ex-offenders without justification. This legislation would allow an employer to refuse to employ or to terminate from employment a felon, regardless of whether the elements of the offense substantially relate to the circumstances of a particular job. The bill would result in denial of jobs to qualified applicants, frustrating the State's efforts to reintegrate ex-offenders into society and its efforts to reduce recidivism.

Employment of offenders who have paid their debt to society plays an important role in reintegrating them back into the community and reducing recidivism. Everyone benefits when ex-offenders successfully turn their lives around to become contributing, law-abiding members of the community – the neighbor, the family, the friend and the taxpayer.

When the doors to employment opportunities are shut, it makes it that much harder for ex-felons to begin anew and steer clear of crime. As more crimes are classified as felonies, ex-offenders will find it increasingly more difficult to find a job. Denial of gainful employment can drive criminals to reoffend. When this happens, a heavy price is paid: public safety is jeopardized; our courts are burdened; and state taxpayers are saddled with the ever-increasing cost of our correctional system.

Should employers ever be allowed to deny someone an employment opportunity based on his or her criminal record? State law says yes. Current law allows all employers to discriminate on the basis of conviction records where the "circumstances of the offense substantially relate to the circumstances of a particular job." If the criminal offense does not relate to the job, MUST the employer hire the person? State law says no. Current law simply does not allow an employer to automatically reject an applicant simply because of the felony record. Employers can refuse to hire for other reasons.



**STATE BAR OF WISCONSIN**



The Civil Rights and Liberties Section and the Public Interest Law Section of the State Bar of Wisconsin believe current law strikes the appropriate balance. It promotes the common goal of reducing recidivism while giving employers the ability to refuse to hire felons whose offense relates to the job. For these reasons, we oppose Senate Bill 207 and urge you not to recommend this bill for passage.

*The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.*

*The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.*





# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

## Officers & Members

President - Bill Smith  
*National Federation of  
Independent Business*

Vice President -  
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*Midwest Equipment  
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Nickolas George  
*Midwest Food Processors  
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Development Association*

Eric Borgerding  
*Wisconsin Hospital  
Association Inc.*

Mark Grapentine  
*Wisconsin Medical Society*

Thomas Howells  
*Wisconsin Motor Carriers  
Association*

Matthew Hauser  
*Wisconsin Petroleum  
Marketers & Convenience  
Store Association*

Edward Lump  
*Wisconsin Restaurant  
Association*

## MEMORANDUM

**To:** Members, Senate Labor, Public Safety, and Urban Affairs Committee  
**From:** Andrew Cook, on behalf Wisconsin Civil Justice Council  
**Date:** October 24, 2011  
**Re:** **Support of Senate Bill 207, Removing Conviction Records as Protected Class under the Wisconsin Fair Employment Act**

Wisconsin is one of only six<sup>i</sup> states that expressly include convicted felons as a protected class of citizens under its Fair Employment Act. This affords a criminal conviction the same protection as age, race and creed under the law.<sup>ii</sup>

For employers looking to hire workers, this special status can lead to costly lawsuits and a no-win liability trap. Hire the convicted felon and be responsible for their actions, or refuse to hire and be subject to a costly lawsuit.

**Assembly Bill 286/Senate Bill 207** protects businesses by reducing unjustified litigation threats while aligning Wisconsin law with the vast majority of other states.

The bill also preempts cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record.

### **Background of Wisconsin Fair Employment Act**

The current Wisconsin Fair Employment Act (WFEA) prohibits employment discrimination based on age, ancestry, arrest record, *conviction record*, creed, color, disability, marital status, military service, national origin, race, sex, or use or nonuse of legal products during nonwork hours off the employer's premises.

The WFEA does provide an exception to the conviction record prohibition where the "felony, misdemeanor or other offense...substantially relates to the circumstances of the particular job."<sup>iii</sup> However, the "substantially relates" exception is not well defined in the statutes. Courts and administrative agencies have broad discretion when applying this standard and therefore it is not at all clear to businesses how the exception will be applied when hiring or terminating an individual.

### **Law has been a Deterrent to Businesses while Protecting Violent Criminals**

Although current law provides an exception allowing employers to refuse to hire or terminate a person based on their conviction record if it "substantially relates" to the job, the exception is broadly written and fails to provide employers the necessary guidance they need to run their businesses. As a result of the law, employers may face costly and dubious lawsuits from individuals who were either terminated from their position or not hired, simply because the person may have had a conviction record.

A convicted felon who is not hired or terminated merely has to file a claim under the WFEA and seek damages, likely forcing the employer to settle the case or incur unnecessary expenses fighting the lawsuit. More troubling, the law protects violent criminals over employers.

(over)

**The “Halloween Killer,” Gerald Turner:** Known as the “Halloween Killer,” Gerald Turner was convicted of raping and murdering a 9-year-old girl who disappeared while trick-or-treating in Fond du Lac. After his release from prison, Turner applied for a job sorting recyclables at Waste Management, Inc. in Madison. After Waste Management refused to hire him, Turner filed a lawsuit under the WFEA. An administrative law judge found probable cause that unlawful discrimination based on conviction records had occurred.<sup>iv</sup> As a result, Waste Management settled out of court with Turner for an undisclosed amount of money.

**Milwaukee Public Schools Case:** Another example is a case involving Mark Moore who was convicted of throwing hot grease from a pan directed at his girlfriend, which instead hit a 20-month-old child, causing severe burns to the child. After serving time in jail, Moore was hired as a maintenance person with the Milwaukee Public Schools (MPS) system. After learning of his conviction, MPS terminated Moore for intentionally falsifying his employment application by failing to include his conviction.

Moore reapplied for a similar job but was not hired by MPS. Moore then filed a discrimination lawsuit under the WFEA against MPS with the Department of Workforce Development. The Court of Appeals concluded that MPS unlawfully discriminated against Moore based on his conviction record. Applying the nebulous “substantially related” test, the court ruled that the circumstances of Moore’s conviction were not substantially related to the job of Boiler Attendant Trainee.

### **Wisconsin Should Remove Convicted Felons as a Protected Class under the WFEA**

It is time for Wisconsin to remove the conviction record as a basis for discrimination under the WFEA for the following reasons:

- The current law is undesirable because it expressly grants individuals with conviction records the same status of a protected class. A person’s conviction record should not be placed in the same category as other bases of discrimination, such race, sex, religion, and other commonly protected classes.
- The current law is unnecessary because federal law protects employees from unlawful discrimination by employers. For example, under Title VII of the Civil Rights Act of 1964, if an employer’s hiring policy has a “disparate impact” on minorities and is not justified by a business necessity, it is unlawful.
- WFEA’s convicted records prohibition denies employers the ability to truly assess job applicants. An applicant’s character and his or her propensity to commit crimes are highly relevant to businesses when making hiring decisions. A strict application of the law against employers’ use of conviction records denies employers an important element in their hiring decisions.
- Like many other states, Wisconsin recognizes negligent hiring as a tort action. Therefore, a Wisconsin business could potentially be negligent for hiring a person with a conviction record if the employer knew, or should have known, the person was prone to commit a crime against a third party while performing the employee’s job duties.

<sup>i</sup> The other five states with similar state statutes include: Hawaii (Haw. Rev. Stat. Ann. § 378-2); Illinois (775 Ill. Comp. Stat. Ann. 5/2-103); Kansas (Kan. Stat. Ann. § 22-4710(f)); New York (N.Y. CORRECT LAW § 752); Pennsylvania (19 Pa. Cons. Stat. Ann. § 9125).

<sup>ii</sup> Thomas M. Hruz, Comment: *The Unwisdom of the Wisconsin Fair Employment Act’s Ban on Employment Discrimination on the Basis of Conviction Records*, 85 Marq. L. Rev. 779, 781 (Spring 2002).

<sup>iii</sup> Wis. Stat. § 111.335(1)(c)(1).

<sup>iv</sup> Thomas M. Hruz, *Criminals Escaping Affliction: Gerald Turner and Wisconsin’s Fair Employment Law*, WI: Wisconsin Interest, Winter 2000, at 7.

# WISCONSIN HOSPITAL ASSOCIATION, INC.



**Date:** October 24, 2011

**To:** Members of the Senate Labor, Public Safety, and  
Urban Affairs Committee – Senator Van Wanggaard, Chair

**From:** Judy Warmuth – Vice President, Workforce Development  
Paul Merline – Vice President, Government Affairs

**Re:** Support for SB 207, Relating to permitting an employer to refuse to employ an  
individual who has been convicted of a felony

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The Wisconsin Hospital Association (WHA) asks you to support Senate Bill (SB) 207, which would allow employers to terminate or refuse to hire an individual based on a felony conviction record, regardless of whether the circumstances of the felony substantially relate to the circumstances of the particular job.

For hospitals, providing for and assuring the safety of patients and protecting them from risk is a constant priority. Beyond patients, the safety of the entire hospital environment must also be taken into consideration in the decisions that are made 24 hours a day, seven days a week, 365 days a year.

Hospitals need to be able to hire the best individuals available for the positions they need to fill, and do so while struggling with already burdensome and sometimes contradictory regulatory requirements. We need to meet requirements that help ensure the safety of our patients, staff, and their property while being careful not to run afoul of laws barring discrimination based on a past criminal record. Current standards, unfortunately, are not clear, making it even more difficult to make these important decisions.

Employers should have the freedom to select individuals that are the best fit for the job openings they have available. Hospitals in particular need to be able to accomplish this while at the same time maintaining the utmost levels of safety for their patients and all their employees.

WHA asks that you support SB 207 to ensure employers the flexibility they need to maintain the best possible work environment for those they serve, and those they employ.

## **About WHA**

The Wisconsin Hospital Association (WHA) represents over 140 hospitals and health systems in Wisconsin, nearly all of which are not-for-profit. WHA's mission is advocating for policies that enable our members to provide high quality, affordable and accessible health care services that result in healthier communities. WHA takes a leadership role in fostering a climate of collaboration, respect, and interdependency between and among various stakeholders that affect health care.



Testimony regarding SB 207

Submitted by: Wendy Cooper

October 24, 2011

Hearing before the Senate Committee on Labor, Public Safety and Urban Affairs  
Chairman Wangaard, and members of the Committee:

Thank you for the opportunity to express my opinion regarding Senate Bill 207.

My name is Wendy Cooper, and I come before you today as a Pastor in training, and seminary student preparing for Christian ministry. Prior to seminary I spent a decade as a staff member at a large church in Madison where I had primary responsibility for outreach and community ministries, including responding to people in crisis seeking assistance from the church.

In addition, I have served on the Board of Directors of the Madison Area Urban Ministry, Wisconsin Interfaith IMPACT, and Dane County United.

I oppose this legislation because I do not believe that it is in the best interest of this State to help create a class of permanently unemployable adults. I am also here to testify that misguided legislation like this is like a TAX on church-goers in this state. Please let me explain why that is.

When people cannot find work they become desperate. And when people are desperate – they often find their way to local churches. Every Pastor I know has experienced an exponential increase in the number of people seeking our help in recent years.

Over the last decade I have worked directly with many men and women with felony convictions, all of whom were trying to return to community and family life after a period of incarceration. Almost without exception they were visiting my church office seeking assistance because they could not find employment. No employment meant that they were unable to pay for basic things like housing, food, medications for themselves and family members, and transportation.

No employment meant that they could not contribute to the support of their children, or to the support of other family members.

No employment meant that they had no possibility of health insurance.

For some, no employment meant the threat of a probation/parole revocation and return to prison. And when individuals are returned to prison because of probation/parole violations related to not being employed, we extend the taxpayer costs of their incarceration; and their families suffer from their extended absence and additional lost support.

The Church is called to respond with mercy to those who are hungry, who are homeless, who are ill. Our congregation members are increasingly asked to give, and give and give some more to respond to crisis situations – and despite the dramatic declines in household income that many of our members are experiencing this year – they are reaching into their pockets to respond.

Legislation like this that exacerbates the problem of unemployment for people who have been convicted of felonies will increase the demand on churches and their members. And we are already feeling the weight of increasing poverty, increasing unemployment and declining wages in this state. And we are already feeling the impact of high unemployment among people who have felony convictions in their past.

Employers can look up an applicant on the WI Circuit Court Access Program (CCAP) with ease, and my guess is that many applicants with felonies are being screened out right now.

In over a decade I have never heard of a case where an applicant successfully challenged an employer over denial of employment related to having a felony. Since 2000, I have never personally met nor have I heard of any applicant who even considered challenging an employer over a rejected application. Where is the evidence that a serious problem exists requiring a radical action like SB 207?

What is the state's interest in creating a class of people that can be barred, permanently, from employment? There is none.

To the contrary, the State of Wisconsin has an interest in returning people to the community and encouraging their return to gainful employment as quickly as possible. And the state has an interest in keeping those people employed. Existing law provides appropriate protection to employers. The business community may have a desire for this legislation, but it is not in the State of Wisconsin's interests to support their desire.

I urge you to vote no on SB 207.